TEXAS REGISTER

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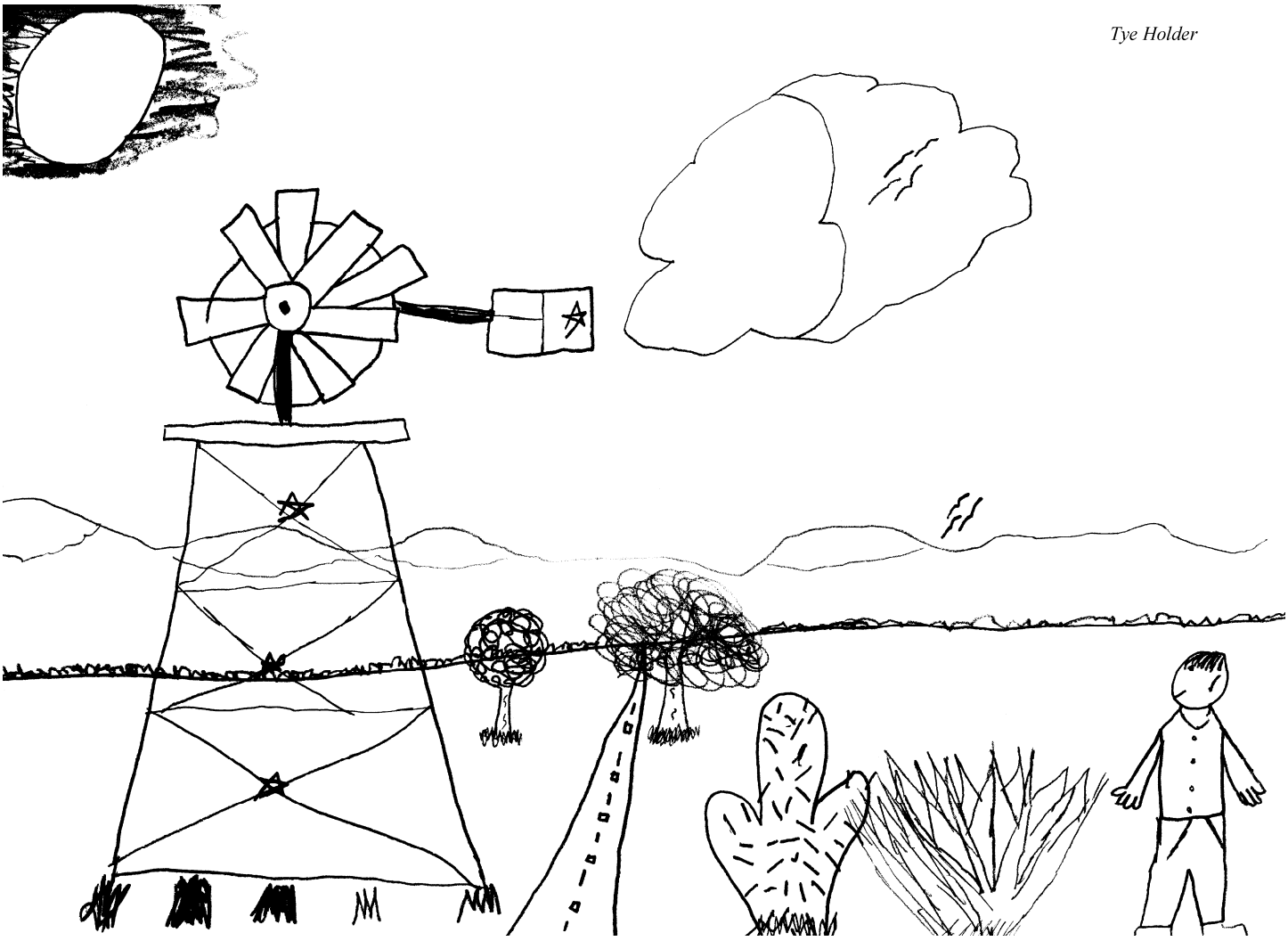

Tye Holder

School children's artwork is used to decorate the front cover and blank filler pages of the *Texas Register*. Teachers throughout the state submit the drawings for students in grades K-12. The drawings dress up the otherwise gray pages of the *Texas Register* and introduce students to this obscure but important facet of state government.

The artwork featured on the front cover is chosen at random. Inside each issue, the artwork is published on what would otherwise be blank pages in the *Texas Register*. These blank pages are caused by the production process used to print the *Texas Register*.

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Open Meetings

Statewide agencies and regional agencies that extend into four or more counties post meeting notices with the Secretary of State.

Meeting agendas are available on the *Texas Register*'s Internet site:
http://www.sos.state.tx.us/open/index.shtml

Members of the public also may view these notices during regular office hours from a computer terminal in the lobby of the James Earl Rudder Building, 1019 Brazos (corner of 11th Street and Brazos) Austin, Texas. To request a copy by telephone, please call 463-5561 in Austin. For out-of-town callers our toll-free number is 800-226-7199. Or request a copy by email: register@sos.state.tx.us

For items ***not*** available here, contact the agency directly. Items not found here:

- minutes of meetings
- agendas for local government bodies and regional agencies that extend into fewer than four counties
- legislative meetings not subject to the open meetings law

The Office of the Attorney General offers information about the open meetings law, including Frequently Asked Questions, the *Open Meetings Act Handbook*, and Open Meetings Opinions.
http://www.oag.state.tx.us/opinopen/opengovt.shtml

The Attorney General's Open Government Hotline is 512-478-OPEN (478-6736) or toll-free at (877) OPEN TEX (673-6839).

Additional information about state government may be found here:
http://www.state.tx.us/

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Meeting Accessibility. Under the Americans with Disabilities Act, an individual with a disability must have equal opportunity for effective communication and participation in public meetings. Upon request, agencies must provide auxiliary aids and services, such as interpreters for the deaf and hearing impaired, readers, large print or Braille documents. In determining type of auxiliary aid or service, agencies must give primary consideration to the individual's request. Those requesting auxiliary aids or services should notify the contact person listed on the meeting notice several days before the meeting by mail, telephone, or RELAY Texas. TTY: 7-1-1.

THE GOVERNOR

As required by Government Code, §2002.011(4), the *Texas Register* publishes executive orders issued by the Governor of Texas. Appointments and proclamations are also published. Appointments are published in chronological order. Additional information on documents submitted for publication by the Governor's Office can be obtained by calling (512) 463-1828.

Appointments

Appointments for August 26, 2008

Appointed as Judge of the 397th Judicial District Court, Grayson County, pursuant to SB 1951, 80th Legislature, Regular Session, effective September 15, 2008, for a term until the next General Election and until his successor shall be duly elected and qualified, Brian Keith Gary of Gunter.

Appointed to the Statewide Health Coordinating Council for a term to expire August 1, 2011, Lorraine O'Donnell of El Paso (replacing Joan Biggerstaff of Plano whose term expired).

Appointed to the Crime Victims' Institute Advisory Council for a term to expire January 31, 2009, Lori Kennedy of Austin (replacing Nancy Harrington of The Woodlands whose term expired).

Appointed to the Crime Victims' Institute Advisory Council for a term to expire January 31, 2009, Lana Myers of Coppell (replacing Dianne Jones of Farmers Branch whose term expired).

Appointed to the Crime Victims' Institute Advisory Council for a term to expire January 31, 2009, Terry Gilmour of Midland (replacing Jimmy Westcott of Dallas whose term expired).

Appointed to the Crime Victims' Institute Advisory Council for a term to expire January 31, 2009, Stephanie Pecora of Houston (Ms. Pecora is being reappointed).

Appointed to the Crime Victims' Institute Advisory Council for a term to expire January 31, 2009, Anthony York of Pearland (replacing Lisa Womack of Arlington whose term expired).

Appointed to the Crime Victims' Institute Advisory Council for a term to expire January 31, 2009, Michael Valdez of Conroe (Mr. Valdez is being reappointed).

Appointed to the Crime Victims' Institute Advisory Council for a term to expire January 31, 2010, Henry Porretto of Galveston (replacing Barney Whitson of San Antonio whose term expired).

Appointed to the Crime Victims' Institute Advisory Council for a term to expire January 31, 2010, Sydney Kroll Register of Georgetown (replacing Sonia Higgins of Amarillo whose term expired).

Appointed to the Crime Victims' Institute Advisory Council for a term to expire January 31, 2010, Debbie Unruh of Amarillo (replacing Paulette Everett-Norman of Conroe whose term expired).

Appointed to the Crime Victims' Institute Advisory Council for a term to expire January 31, 2010, Ben Crouch of College Station (Mr. Crouch is being reappointed).

Appointed to the Crime Victims' Institute Advisory Council for a term to expire January 31, 2010, Nancy Ghigna of The Woodlands (Ms. Ghigna is being reappointed).

Appointed to the Crime Victims' Institute Advisory Council for a term to expire January 31, 2010, Rodman Goode of Cedar Hill (Mr. Goode is being reappointed).

Appointed to the Crime Victims' Institute Advisory Council for a term to expire January 31, 2010, Darlene McLaughlin of Elgin (Ms. McLaughlin is being reappointed).

Appointed to the Crime Victims' Institute Advisory Council for a term to expire January 31, 2010, Mary Anne Wiley of Austin (Ms. Wiley is being reappointed).

Appointments for August 27, 2008

Appointed to the Texas State Board of Dental Examiners for a term to expire February 1, 2013, Jerry Romero of El Paso (replacing Phyllis Stine of Abilene whose term expired).

Appointed as Public Counsel for the Office of Public Insurance Counsel, effective September 1, 2008, for a term to expire February 1, 2009, Deeia Denise Beck of Fort Worth (replacing Roderick Bordelon, Jr. of Austin who resigned).

Appointed as Commissioner of Workers' Compensation, effective September 1, 2008, for a term to expire February 1, 2009, Roderick A. Bordelon, Jr. of Austin (replacing Albert Betts of Austin who resigned).

Rick Perry, Governor

TRD-200804682

♦ ♦ ♦

Proclamation 41-3157

TO ALL TO WHOM THESE PRESENTS SHALL COME:

BE IT KNOWN THAT I, RICK PERRY, GOVERNOR OF THE STATE OF TEXAS, DO HEREBY ORDER A GENERAL ELECTION to be held throughout the State of Texas on the first TUESDAY NEXT AFTER THE FIRST MONDAY IN NOVEMBER, 2008, same being the 4th day of NOVEMBER, 2008; and

NOTICE THEREOF IS HEREBY GIVEN to the people of Texas and to the COUNTY JUDGE of each county who is directed to cause said election to be held at each precinct in the county on such date for the purpose of electing presidential electors, Members of Congress, state and district officers, and Members of the Legislature, as required by Section 3.003 of the Texas Election Code.

IN TESTIMONY WHEREOF, I have hereto signed my name and have officially caused the Seal of State to be affixed at my Office in the City of Austin, Texas, this the 26th day of August, 2009.

Rick Perry, Governor

Attested by: Esperanza "Hope" Andrade, Secretary of State

TRD-200804681

♦ ♦ ♦

THE ATTORNEY GENERAL

The *Texas Register* publishes summaries of the following: Requests for Opinions, Opinions, Open Records Decisions.

An index to the full text of these documents is available from the Attorney General's Internet site http://www.oag.state.tx.us. Telephone: 512-936-1730. For information about pending requests for opinions, telephone 512-463-2110.

An Attorney General Opinion is a written interpretation of existing law. The Attorney General writes opinions as part of his responsibility to act as legal counsel for the State of Texas. Opinions are written only at the request of certain state officials. The Texas Government Code indicates to whom the Attorney General may provide a legal opinion. He may not write legal opinions for private individuals or for any officials other than those specified by statute. (Listing of authorized requestors: http://www.oag.state.tx.us/opinopen/opinhome.shtml.)

Opinions

Opinion No. GA-0656

The Honorable Bill Burnett

San Jacinto County Criminal District Attorney

#1 State Highway 150, Room 21

Coldspring, Texas 77331-0430

Re: Whether a county policy prohibiting the rehire of an individual within one year after terminating an employment relationship with the county applies to the hiring of a deputy constable (RQ-0681-GA)

S U M M A R Y

A county policy adopted by the commissioners court that prohibits the rehire of an individual whose employment relationship with the county terminated within the past year does not apply to a constable.

Opinion No. GA-0657

Mr. Robert Scott

Commissioner of Education

Texas Education Agency

1701 North Congress Avenue

Austin, Texas 78701-1494

Re: Whether all school districts and charter schools must offer the elective course described in Education Code section 28.011(a) in grades 9 through 12 each school year (RQ-0683-GA)

S U M M A R Y

Section 28.002(a) of the Education Code defines the required foundation and enrichment curriculum for school districts and charter schools but does not identify courses that school districts must offer. Education Code subsection 28.002(a)(2)(H) provides that the enrichment curriculum will include "religious literature, including the Hebrew Scriptures (Old Testament) and New Testament, and its impact on history and literature," but the Legislature did not mandate that this curriculum instruction be provided in independent courses. The State Board of Education, however, may provide for enrichment curriculum offerings in school districts by rule.

In furtherance of the enrichment curriculum requirement concerning "religious literature, including the Hebrew Scriptures (Old Testament) and New Testament, and its impact on history and literature," section 28.011 of the Education Code authorizes but does not require school districts and charter schools to offer elective courses on the Hebrew Scriptures and its impact or on the New Testament and its impact. Such discretion does not, however, mean that school districts or charter schools are not required to comply with the curriculum requirements in subsection 28.002(a)(2).

If a school district or charter school chooses to offer a course authorized by section 28.011 and fewer than fifteen students at a campus register to enroll in the course, the district or charter school is not required to provide the course at that campus for that semester, but that does not mean that the school is not required to comply with the curriculum requirements in subsection 28.002(a)(2).

Opinion No. GA-0658

The Honorable David H. Aken

San Patricio County Attorney

San Patricio County Courthouse, Room 108

Sinton, Texas 78387

Re: Maximum distance that a county may require that a sexually oriented business be located from a residence, church, elementary school, and other designated facilities (RQ-0680-GA)

S U M M A R Y

Local Government Code section 243.006(a) authorizes a county to, among other things, prohibit a sexually oriented business from locating "within a certain distance of a school, regular place of religious worship, residential neighborhood, or other specified land use . . . [found] to be inconsistent with the operation of" such a business. TEX. LOC. GOV'T CODE ANN. §243.006(a) (Vernon 2005). Section 243.006(a) does not establish any particular distance requirement between sexually oriented businesses and other land uses, but implicitly leaves this decision to the discretion of the governing body adopting the restriction. That discretion must be exercised within the confines of the federal and state constitutions, as interpreted by the courts. The exact distance that a county may require a sexually oriented business be located from other land uses is a fact-sensitive inquiry.

For further information, please access the website at www.oag.state.tx.us or call the Opinion Committee at (512) 463-2110.

TRD-200804727
Stacey Napier
Deputy Attorney General
Office of the Attorney General
Filed: September 3, 2008

♦ ♦ ♦

EMERGENCY RULES

Emergency Rules include new rules, amendments to existing rules, and the repeals of existing rules. A state agency may adopt an emergency rule without prior notice or hearing if the agency finds that an imminent peril to the public health, safety, or welfare, or a requirement of state or federal law, requires adoption of a rule on fewer than 30 days' notice. An emergency rule may be effective for not longer than 120 days and may be renewed once for not longer than 60 days (Government Code, §2001.034). An emergency rule may be effective for not longer than 120 days and may be renewed once for not longer than 60 days. (Government Code, §2001.034).

TITLE 4. AGRICULTURE

PART 1. TEXAS DEPARTMENT OF AGRICULTURE

CHAPTER 19. QUARANTINES AND NOXIOUS AND INVASIVE PLANTS
SUBCHAPTER U. ASIAN CITRUS PSYLLID QUARANTINE

4 TAC §19.411, §19.413

The Texas Department of Agriculture (the department) adopts on an emergency basis amendments to §19.411 and §19.413, concerning a quarantine for a recently introduced and highly threatening pest, *Diaphorina citri* Kuwayama (*Homoptera: Psyllidae*), the Asian citrus psyllid (ACP). The emergency amendment to §19.411 adds three counties to the list of quarantined areas. The emergency amendment to §19.413 clarifies restrictions imposed by the quarantine and changes the reference for required Federal treatment procedures. The emergency amendment to §19.411 updates the current quarantine by adding Brazos, Fort Bend and Jefferson counties to the quarantined area, thus combating spread of the psyllid to non-infested counties. The emergency amendment to §19.413 adds leaves of Kaffir lime leaf (*Citrus hystri* L.) as leaves intended for consumption; it also changes the reference to required treatment procedures detailed in the Animal and Plant Health Inspection Service's (APHIS) treatment schedule.

The emergency adoption of amendments to the ACP quarantine is needed to protect the Texas citrus industry from a new major disease threat from a neighboring state. ACP is the vector for *Candidatus* Liberibacter asiaticus, the species of bacteria that causes citrus greening (also known as huanglongbing or HLB). Citrus greening causes reduced production of fruit, malformation of fruit, loss of plant vigor and plant death. Control of outbreaks of HLB is complicated by the fact that infected plants don't show symptoms for several months. There is no treatment for HLB; the only effective treatment is removal of infected plants coupled with elimination of ACP that can vector the disease to other citrus plants. The severity of HLB is such that the disease has made commercial production of citrus uneconomical in some parts of the world.

Citrus greening and ACP were unknown in the US until recently. In August 2005, Florida became the first US state to become infected with HLB; this followed introduction of ACP into Florida seven years earlier. Currently the whole state of Florida is infected. Florida is prohibited by Federal quarantine from exporting citrus to any citrus producing state. In 2006-2007 TAMUKCC-Weslaco scientists determined in a survey that ACP infests 32 Texas counties. The survey disclosed no evidence of HLB in Texas. On May 29, 2008, the USDA confirmed the presence of ACP in southern Louisiana; on June 12, 2008, HLB was confirmed in one citrus tree in Louisiana's Orleans Parish. A subsequent survey found no further instances of HLB in Louisiana, but it disclosed ACP in 12 Louisiana parishes. More extensive surveys in July 2008 identified ACP infestations (but no HLB) in two counties in Georgia and one county in Alabama.

On November 2, 2007, the Animal and Plant Health Inspection Service (APHIS) issued a Federal Order which quarantined 32 Texas counties for the Asian citrus psyllid. APHIS required that Texas establish a parallel quarantine by December 1, 2007 or they would quarantine the entire state of Texas. Consequently, the department filed an Asian citrus psyllid emergency quarantine, which was followed by adoption of a permanent quarantine. The department's quarantine combats the artificial spread of ACP into non-infested counties of Texas and into those states into which the Federal Order allows psyllid host material to enter. Prevention of the artificial spread of ACP into non-infested counties of Texas will deter any spread of citrus greening when and if the disease is found in Texas. Emergency adoption of amendments to §19.411 and §19.413 is justified by the immediate proximity of a new potential source of HLB and by the urgency of avoiding the entry and spread of HLB in Texas.

An emergency rule adopted under §2001.034 may be effective for no longer than 120 days and may be renewed for no longer than 60 days. Nevertheless, the department intends to propose adoption of these emergency rules on a permanent basis in a separate submission.

The emergency amendments to §19.411 and §19.413 are adopted in accordance with the Texas Agriculture Code (the Code), §71.001 which authorizes the department to establish a quarantine for an infested area against an in-state pest if it determines that the pest is dangerous and is not widely distributed in this state; §71.007, which authorizes the department to adopt rules as necessary to protect agricultural and horticultural interests, including rules to prevent the selling, moving, or transporting of any plant, plant product, or substance that is found to be infested or found to be from a quarantined area; or provide for specific treatment of a grove or orchard or of infested or infected plants, plant products, or substances; and the Texas Government Code, §2001.034, which provides for the adoption of rules on an emergency basis, without notice and comment.

§19.411. Quarantined Areas.

The quarantined areas are:

(1) (No change.)

(2) the Texas counties of Aransas, Atascosa, Bee, Bexar, Brazoria, Brazos, Brooks, Caldwell, Cameron, Dimmit, Duval, Fort Bend, Harris, Hidalgo, Jefferson, Jim Hogg, Jim Wells, Kenedy, Kleberg, Live Oak, Matagorda, Maverick, McMullen, Nueces, Refugio,

San Patricio, Starr, Uvalde, Val Verde, Victoria, Waller, Washington, Webb, Willacy, and Zapata; and

(3) (No change.)

§19.413. Restrictions.

(a) (No change.)

(b) Exceptions. To be eligible to move from quarantined areas, quarantined articles must meet the following requirements.

(1) Requirements to move from quarantined areas of Texas to free areas of Texas.

(A) - (B) (No change.)

(C) In the case of quarantined articles that are intended for consumption (e.g., fresh leaves of curry [~~leaf~~] (*Bergera (=Murraya) koenigii*) or Kaffir lime (*Citrus hystrix* L.) [~~leaves intended for consumption~~], instead of the treatments specified in subparagraph (B) of this paragraph, the leaves must be treated prior to the movement in accordance with the Animal and Plant Health Inspection Service's (APHIS) treatment schedule T101-n-2 (methyl bromide fumigation treatment for external feeding insects on fresh herbs) at the times and rates specified in the treatment manual and safeguarded until export. This information can be found on page 5-2-28 of the treatment manual, located on-line at: http://www.aphis.usda.gov/import_export/plants/manuals/ports/downloads/treatment_pdf/05_02_t100schedules.pdf [~~http://www.aphis.usda.gov/import_export/plants/manuals/ports/down loads/treatment_pdf/05_02_t100schedules.pdf~~]; and

(D) (No change.)

(2) (No change.)

This agency hereby certifies that the emergency adoption has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on August 27, 2008.

TRD-200804675
Dolores Alvarado Hibbs
General Counsel
Texas Department of Agriculture
Effective Date: August 27, 2008
Expiration Date: December 24, 2008
For further information, please call: (512) 463-4075

♦ ♦ ♦

PROPOSED RULES

Proposed rules include new rules, amendments to existing rules, and repeals of existing rules. A state agency shall give at least 30 days' notice of its intention to adopt a rule before it adopts the rule. A state agency shall give all interested persons a reasonable opportunity to submit data, views, or arguments, orally or in writing (Government Code, Chapter 2001).

Symbols in proposed rule text. Proposed new language is indicated by underlined text. [~~Square brackets and strikethrough~~] indicate existing rule text that is proposed for deletion. "(No change)" indicates that existing rule text at this level will not be amended.

TITLE 16. ECONOMIC REGULATION

PART 2. PUBLIC UTILITY COMMISSION OF TEXAS

CHAPTER 25. SUBSTANTIVE RULES APPLICABLE TO ELECTRIC SERVICE PROVIDERS

SUBCHAPTER H. ELECTRICAL PLANNING

DIVISION 1. RENEWABLE ENERGY RESOURCES AND USE OF NATURAL GAS

16 TAC §25.173

The Public Utility Commission of Texas (commission) proposes an amendment to §25.173, relating to Goal for Renewable Energy. The rule will implement Public Utility Regulatory Act (PURA) §39.904(m-1) and (m-2), which allow customers taking transmission level electric service to opt-out from the renewable energy portfolio standard program and direct the commission to establish the reporting requirements and a schedule associated with opting out from this program. This rule is a competition rule subject to judicial review as specified in PURA §39.001(e). Project Number 35628 is assigned to this proceeding.

Ms. Christine Wright, Market Analyst, Competitive Markets Division, has determined that for each year of the first five-year period the rule is in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the rule.

Ms. Wright has determined that for each year of the first five years the rule is in effect the public benefit anticipated as a result of enforcing the rule will be compliance with PURA §39.904 and the ability of large users to opt-out of purchasing renewable energy credits. There may be some adverse economic effect on small businesses or micro-businesses as a result of enforcing this section but these costs cannot be quantified at this time. There may be economic costs to persons who are required to comply with the rule that cannot be quantified at this time. However, these costs are necessary to implement PURA §39.904(m-1) and (m-2).

Ms. Wright has also determined that for each year of the first five years the rule is in effect there should be no effect on local economy and therefore no local employment impact statement is required under Administrative Procedure Act (APA), Texas Government Code §2001.022.

The commission staff will conduct a public hearing on this rulemaking if requested, pursuant to the Administrative Procedure Act, Texas Government Code §2001.029, at the commission's offices located in the William B. Travis Building, 1701 North Congress Avenue, Austin, Texas 78701 on Friday, September 26, 2008, at 10:00 a.m. The request for a public hearing must be received within 31 days after publication.

The commission will also take comment on the following questions pertaining to the proposed rule:

Does PURA permit or require the commission to allow customers receiving electric service at transmission-level voltage who provided the commission with notice in calendar year 2007 to opt-out in compliance year 2008 (a) despite the rule not being in effect at the time that notice was provided or (b) if the rule is not in effect by the end of compliance year 2008? If the commission is permitted but not required to allow such opt-outs, should the commission do so?

Initial comments on the rule may be submitted to the Filing Clerk, Public Utility Commission of Texas, 1701 North Congress Avenue, P.O. Box 13326, Austin, Texas 78711-3326, within 21 days after publication. Sixteen copies of comments are required to be filed pursuant to §22.71(c) of this title. Reply comments may be submitted within 31 days after publication. Comments should be organized in a manner consistent with the organization of the rule. The commission invites specific comments regarding the costs associated with, and benefits that will be gained by, implementation of the rule. The commission will consider the costs and benefits in deciding whether to adopt the rule. All comments should refer to Project Number 35628.

This amendment is proposed under the Public Utility Regulatory Act, Texas Utilities Code Annotated §14.002 (Vernon 2007 and Supplement 2008), which provides the commission with the authority to make and enforce rules reasonably required in the exercise of its powers and jurisdiction; and specifically §39.904(m-1), which allows customers taking electric service at transmission-level voltage to opt-out from the renewable energy portfolio standard program and §39.904(m-2), which directs the commission to establish the reporting requirements and schedule associated with opting-out from this program.

Cross Reference to Statutes: Public Utility Regulatory Act §14.002 and §39.904(m-1) and (m-2).

§25.173. Goal for Renewable Energy.

(a) - (b) (No change.)

(c) Definitions.

(1) (No change.)

(2) Compliance premium--A premium awarded by the program administrator in conjunction with a renewable energy credit that is generated by a renewable energy source that is not powered by wind and meets the criteria of subsection (m) [~~(l)~~] of this section. For the

purpose of the renewable energy portfolio standard requirements, one compliance premium is equal to one renewable energy credit.

(3) - (8) (No change.)

(9) Opt-Out Notice--Written notice submitted to the commission by a transmission-level voltage customer pursuant to PURA §39.904(m-1).

(10) [~~(9)~~] Program administrator--The entity approved by the commission that is responsible for carrying out the administrative responsibilities related to the renewable energy credits trading program as set forth in subsection (g) of this section.

(11) [~~(10)~~] REC aggregator--An entity managing the participation of two or more microgenerators in the REC trading program.

(12) [~~(11)~~] REC offset (offset)--A REC offset represents one megawatt-hour (MWh) of renewable energy from an existing facility that is not eligible to earn renewable energy credits or compliance premiums.

(13) [~~(12)~~] Renewable energy credit (REC or credit)--A REC represents one MWh of renewable energy that is physically metered and verified in Texas and meets the requirements set forth in subsection (e) of this section.

(14) [~~(13)~~] Renewable energy credit account (REC account)--An account maintained by the renewable energy credits trading program administrator for the purpose of tracking the production, sale, transfer, purchase, and retirement of RECs or compliance premiums by a program participant.

(15) [~~(14)~~] Renewable energy credits trading program (trading program)--The process of awarding, trading, tracking, and submitting RECs or compliance premiums as a means of meeting the renewable energy requirements set out in subsection (d) of this section.

(16) [~~(15)~~] Renewable energy resource (renewable resource)--A resource that produces energy derived from renewable energy technologies.

(17) [~~(16)~~] Renewable energy technology--Any technology that exclusively relies on an energy source that is naturally regenerated over a short time and derived directly from the sun, indirectly from the sun, or from moving water or other natural movements and mechanisms of the environment. Renewable energy technologies include those that rely on energy derived directly from the sun, on wind, geothermal, hydroelectric, wave, or tidal energy, or on biomass or biomass-based waste products, including landfill gas. A renewable energy technology does not rely on energy resources derived from fossil fuels, waste products from fossil fuels, or waste products from inorganic sources.

(18) [~~(17)~~] Renewable Portfolio Standard (RPS)--The amount of capacity required to meet the requirements of PURA §39.904 pursuant to subsection (h) of this section.

(19) [~~(18)~~] Repowered Facility--An existing facility that has been modernized or upgraded to use renewable energy technology to produce electricity consistent with this rule.

(20) [~~(19)~~] Retail entity--Municipally-owned utilities, generation and transmission cooperatives and distribution cooperatives that offer customer choice; retail electric providers (REPs); and investor-owned utilities that have not unbundled pursuant to PURA Chapter 39.

(21) [~~(20)~~] Settlement period--The first calendar quarter following a compliance period in which the settlement process for that compliance period takes place.

(22) [~~(21)~~] Small producer--A renewable resource that is less than ten megawatts (MW) in size.

(d) Renewable energy credits trading program (trading program). Renewable energy credits may be generated, transferred, and retired by renewable energy power generators certified pursuant to subsection (o) [~~(n)~~] of this section, retail entities, and other market participants as set forth in this section.

(1) The program administrator shall apportion an RPS requirement among all retail entities as a percentage of the retail sales of each retail entity as set forth in subsection (h) of this section. Each retail entity shall be responsible for retiring sufficient RECs as set forth in subsections (h) and (l) [~~(k)~~] of this section to comply with this section. The requirement to retire RECs to comply with this section becomes effective on the date a retail entity begins serving retail electric customers in Texas or, for an electric utility, as specified by law.

(2) A power generating company may participate in the program and may generate RECs and buy or sell RECs as set forth in subsection (l) [~~(k)~~] of this section.

(3) RECs shall be credited on an energy basis as set forth in subsection (l) [~~(k)~~] of this section.

(4) Municipally-owned utilities and distribution cooperatives that do not offer customer choice have no RPS requirement. However, regardless of whether the municipally-owned utility or distribution cooperative offers customer choice, a municipally-owned utility or distribution cooperative possessing renewable resources that meet the requirements of subsection (e) of this section may sell RECs generated by such a resource to retail entities as set forth in subsection (l) [~~(k)~~] of this section.

(5) (No change.)

(e) Facilities eligible for producing RECs and compliance premiums in the renewable energy credits trading program. For a renewable facility to be eligible to produce RECs and compliance premiums in the trading program it must be either a new facility, a small producer, or a repowered facility as defined in subsection (c) of this section and must also meet the requirements of this subsection.

(1) A renewable energy resource must not be ineligible under subsection (f) of this section and must register pursuant to subsection (o) [~~(n)~~] of this section.

(2) - (7) (No change.)

(f) - (g) (No change.)

(h) Allocation of RPS requirement to retail entities. The program administrator shall allocate RPS requirements among retail entities. Any renewable capacity that is retired before January 1, 2015 or any capacity shortfalls that arise due to purchases of RECs from out-of-state facilities shall be replaced and incorporated into the allocation methodology set forth in this subsection. Any changes to the allocation methodology to reflect replacement capacity shall occur two compliance periods after the facility is retired or the capacity shortfall occurs. The program administrator shall use the following methodology to determine the total annual RPS requirement for a given year and the final RPS allocation for individual retail entities:

(1) The total statewide RPS requirement for each compliance period shall be calculated in terms of MWh and shall be equal to the applicable capacity requirement set forth in this paragraph multiplied by 8,760 hours per year, multiplied by the appropriate capacity conversion factor set forth in subsection (k) [~~(j)~~] of this section. The renewable energy capacity requirements for the compliance period beginning January 1, of the year indicated shall be:

(A) - (J) (No change.)

(2) The final RPS allocation for an individual retail entity for a compliance period shall be calculated as follows:

(A) Beginning with the 2009 compliance period, prior to the preliminary RPS allocation each retail entity's total retail energy sales are reduced to exclude the consumption of customers that opt-out in accordance with subsection (j) of this section. Each retail entity's preliminary RPS allocation is determined by dividing its total retail energy sales in Texas by the total retail sales in Texas of all retail entities, and multiplying that percentage by the total statewide RPS requirement for that compliance period.

(B) - (C) (No change.)

(3) (No change.)

(i) (No change.)

(j) Opt-out notice.

(1) A customer receiving electrical service at transmission-level voltage who submits an opt-out notice to the commission for the applicable compliance period shall be excluded from the RPS requirement. Each opt-out notice must specify the term for which it is effective, which may be a period up to two years.

(2) A customer who submits an opt-out notice for the applicable compliance period will not be required to pay for RECs purchased by a retail entity that is subject to a renewable energy requirement and from whom they purchase electric service. A retail entity that is subject to a renewable energy requirement under this section shall not collect costs attributable to the REC program from an eligible customer who has submitted an opt-out notice. An investor-owned utility whose rates include the cost of RECs shall file a tariff to implement this subsection, not later than 30 days after the effective date of this section.

(3) A customer opt-out notice must be filed in the commission-designated project number before the beginning of a compliance period for the notice to be effective for that period. A customer may revoke a notice under this subsection at any time prior to the end of a compliance period by filing a letter in the designated project number.

(k) [~~(j)~~] Calculation of capacity conversion factor. The capacity conversion factor used by the program administrator to allocate credits to retail entities shall be calculated during the fourth quarter of each odd-numbered compliance year. The capacity conversion factor shall:

(1) Be based on actual generator performance data for the previous two years for all renewable resources in the trading program during that period for which at least 12 months of performance data are available.

(2) Represent a weighted average of generator performance; and

(3) Use all actual generator performance data that is available for each renewable resource, excluding data for testing periods.

(l) [~~(k)~~] Production, transfer, and expiration of RECs. The program administrator shall administer a trading program for renewable energy credits in accordance with the requirements of this subsection.

(1) The owner of a renewable resource shall earn one REC when a MWh is metered at that renewable resource. The program administrator shall record the energy in metered MWh and credit the REC account of the renewable resource that generated the energy on a quarterly basis. Quarterly production shall be rounded to the nearest whole MWh, with fractions of 0.5 MWh or greater rounded up.

(2) The transfer of RECs between parties shall be effective only when the transfer is recorded by the program administrator.

(3) The program administrator shall require that RECs be adequately identified prior to recording a transfer and shall issue an acknowledgement of the transaction to parties upon provision of adequate information. At a minimum, the following information shall be provided:

(A) identification of the parties;

(B) REC serial number, REC issue date, and the renewable resource that produced the REC;

(C) the number of RECs to be transferred; and

(D) the transaction date.

(4) A retail entity shall surrender RECs to the program administrator for retirement from the market in order to meet its RPS requirement for a compliance period. The program administrator will document all REC retirements annually.

(5) On or after each April 1, the program administrator will retire RECs that have not been retired by retail entities and have reached the end of their compliance life.

(6) The program administrator may establish a procedure to ensure that the award, transfer, and retirement of credits are accurately recorded.

(7) The issue date of RECs created by a renewable energy resource shall coincide with the beginning of the compliance period (calendar year) in which the credits are generated. All RECs shall have a compliance life of three compliance periods, after which the program administrator will retire them from the trading program.

(8) Each REC that is not used in the compliance period in which it was created may be banked and is valid for the next two compliance periods.

(m) [~~(l)~~] Target for renewable technologies other than wind power. In order to meet the target of at least 500 MW of the total installed renewable capacity after September 1, 2005, coming from a renewable energy technology other than a source using wind energy as set forth in subsection (a)(1) of this section, the program administrator shall award compliance premiums to certified REC generators other than those powered by wind that were installed and certified by the commission pursuant to subsection (o) [~~(n)~~] of this section after September 1, 2005. A compliance premium is created in conjunction with a REC.

(1) For eligible non-wind renewable technologies, one compliance premium shall be awarded for each REC awarded for energy generated after December 31, 2007.

(2) Except as provided in this subsection, the award, retirement, trade, and registration of compliance premiums shall follow the requirements of subsections (d), (l) [~~(k)~~] and (n) [~~(m)~~] of this section.

(3) A compliance premium may be used by any entity toward its RPS requirement pursuant to subsection (h) of this section.

(4) The program administrator shall increase the statewide RPS requirement calculated for each compliance period pursuant to subsection (h)(1) of this section by the number of compliance premiums retired during the previous compliance period.

(n) [~~(m)~~] Settlement process. The first quarter following the compliance period shall be the settlement period during which the following actions shall occur:

(1) By January 31, the program administrator will notify each retail entity of its total RPS requirement for the previous compliance period as determined pursuant to subsection (h) of this section.

(2) By March 31, each retail entity shall submit credits or compliance premiums to the program administrator from its account equivalent to its RPS requirement for the previous compliance period. If the retail entity does not submit sufficient credits or compliance premiums to satisfy its obligation, the retail entity is subject to the penalty provisions in subsection (p) [~~(o)~~] of this section.

(3) The program administrator may request the commission to adjust the deadlines set forth in this section if changes to the ERCOT settlement calendar or other factors affect the availability of reliable retail sales data.

(o) [~~(n)~~] Certification of renewable energy facilities. The commission shall certify all renewable facilities that will produce either REC offsets, RECs, or compliance premiums for sale in the trading program. To be awarded RECs, or REC offsets, or compliance premiums, a power generator must complete the certification process described in this subsection. The program administrator shall not award offsets, RECs, or compliance premiums for energy produced by a power generator before it has been certified by the commission.

(1) The designated representative of the generating facility shall file an application with the commission on a form approved by the commission for each renewable energy generation facility. At a minimum, the application shall include the location, owner, technology, and rated capacity of the facility and shall demonstrate that the facility meets the resource eligibility criteria in subsection (e) of this section. Any subsequent changes to the information in the application shall be filed with the commission within 30 days of such changes.

(2) No later than 30 days after the designated representative files the certification form with the commission, the commission shall inform both the program administrator and the designated representative whether the renewable facility has met the certification requirements. At that time, the commission shall either certify the renewable facility as eligible to receive RECs, offsets, or compliance premiums, or describe any insufficiencies to be remedied. If the application is contested, the time for acting is extended for such time as is necessary for commission action.

(3) Upon receiving notice of certification of new facilities, the program administrator shall create a REC account for the designated representative of the renewable resource.

(4) The commission or program administrator may make on-site visits to any certified facility, and the commission shall decertify any facility if it is not in compliance with the provisions of this section.

(5) A decertified renewable generator may not be awarded RECs. However, any RECs awarded by the program administrator and transferred to a retail entity prior to the decertification remain valid.

(p) [~~(o)~~] Penalties and enforcement. If by April 1 of the year following a compliance period the program administrator determines that a retail entity has not retired sufficient credits or compliance premiums to satisfy its allocation, the retail entity shall be subject to an administrative penalty pursuant to PURA §15.023, of $50 per MWh that is deficient.

(q) [~~(p)~~] Microgenerators and REC aggregators. A REC aggregator may manage the participation of multiple microgenerators in the REC trading program. The program administrator shall assign to the REC aggregator all RECs accrued by the microgenerators who are under a REC management contract with the REC aggregator.

(1) The microgenerator's units shall be installed and connected to the grid in compliance with P.U.C. Substantive Rules, applicable interconnection standards adopted pursuant to the P.U.C. Substantive Rules, and federal rules.

(2) Notwithstanding subsection (e)(3) of this section, a REC aggregator may use any of the following methods for reporting generation to the program administrator, as long as the same method is used for each microgenerator in an aggregation unit, as defined by the REC aggregator. A REC aggregator may have more than one aggregation and may choose any of the methods listed below for each aggregation unit.

(A) The REC aggregator may provide the program administrator with production data that is measured and verified by an electronic meter that meets ANSI C12 standards and that will be separate from the aggregator's billing meter for the service address and for which the billing data and the renewable energy data are separate and verifiable data. Such actual data shall be collected and transmitted within a reasonable time and shall be subject to verification by the program administrator. REC aggregators using this method shall be awarded one REC for every MWh generated.

(B) The REC aggregator may provide the program administrator with sufficient information for the program administrator to estimate with reasonable accuracy the output of each unit, based on known or observed information that correlates closely with the generation output. REC aggregators using this method shall be awarded one REC for every 1.25 MWh generated. After installing the unit, the certified technician shall provide the microgenerator, the REC aggregator, and the program administrator the information required by the program administrator pursuant to this paragraph (2) of this subsection.

(C) A generating unit may have a meter that transmits actual generation data to the program administrator using applicable protocols and procedures. Such protocols and procedures shall require that actual data be collected and transmitted within a reasonable time. REC aggregators using this method shall be awarded one REC for every MWh generated.

(3) REC aggregators shall register with the commission and the program administrator and also register to participate in the REC trading program.

(4) A microgenerator participating in the REC trading program individually without the assistance of a REC aggregator shall comply with the requirements of this subsection.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on August 28, 2008.

TRD-200804683
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Earliest possible date of adoption: October 12, 2008
For further information, please call: (512) 936-7223

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TITLE 19. EDUCATION

PART 2. TEXAS EDUCATION AGENCY

CHAPTER 61. SCHOOL DISTRICTS

SUBCHAPTER AA. COMMISSIONER'S RULES ON SCHOOL FINANCE

19 TAC §61.1017

(Editor's note: The text of the following section proposed for repeal will not be published. The section may be examined in the offices of the Texas Education Agency or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin.)

The Texas Education Agency proposes the repeal of §61.1017, concerning the Optional Flexible Year Program (OFYP). The section addresses provisions for approval and operation of a flexible year program. The proposed rule action would repeal the existing OFYP rule so it can be organized with other rules concerning student attendance in 19 TAC Chapter 129, Student Attendance.

Texas Education Code (TEC), §29.0821, authorizes the commissioner of education to adopt rules for the administration of flexible year programs provided by school districts and open-enrollment charter schools for students who did not or are likely not to perform successfully on state assessment instruments or who would not otherwise be promoted to the next grade level. Through 19 TAC §61.1017, adopted to be effective October 18, 2005, the commissioner exercised rulemaking authority, specifying in rule general provisions, student eligibility, program criteria, approval process, and funding for an OFYP.

The proposed rule action would repeal 19 TAC §61.1017, Optional Flexible Year Program. New 19 TAC Chapter 129, Student Attendance, Subchapter AA, Commissioner's Rules, §129.1029, Optional Flexible Year Program, is being proposed in a separate rule action in this issue. The proposed repeal and new rule would organize the provisions for an OFYP in the same chapter as other rules concerning student attendance.

Shirley Beaulieu, associate commissioner for finance/chief financial officer, has determined that for the first five-year period the repeal is in effect there will be no additional costs for state or local government as a result of enforcing or administering the repeal.

Ms. Beaulieu has determined that for each year of the first five years the repeal is in effect the public benefit anticipated as a result of enforcing the repeal will be the organization of the OFYP rule with other rules concerning student attendance, making it easier for the public to find information on the program. There is no anticipated economic cost to persons who are required to comply with the proposed repeal.

There is no direct adverse economic impact for small businesses and microbusinesses; therefore, no regulatory flexibility analysis, specified in Texas Government Code, §2006.002, is required.

The public comment period on the proposal begins September 12, 2008, and ends October 13, 2008. Comments on the proposal may be submitted to Cristina De La Fuente-Valadez, Policy Coordination Division, Texas Education Agency, 1701 North Congress Avenue, Austin, Texas 78701, (512) 475-1497. Comments may also be submitted electronically to *rules@tea.state.tx.us* or faxed to (512) 463-0028. A request for a public hearing on the proposal submitted under the Administrative Procedure Act must be received by the commissioner of education not more than 15 calendar days after notice of the proposal has been published in the *Texas Register* on September 12, 2008.

The repeal is proposed under the TEC, §29.0821, which authorizes the commissioner of education to adopt rules for the administration of the Optional Flexible Year Program.

The proposed repeal implements the TEC, §29.0821.

§61.1017. Optional Flexible Year Program.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on August 29, 2008.

TRD-200804696
Cristina De La Fuente-Valadez
Director, Policy Coordination
Texas Education Agency
Earliest possible date of adoption: October 12, 2008
For further information, please call: (512) 475-1497

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CHAPTER 97. PLANNING AND ACCOUNTABILITY

The Texas Education Agency (TEA) proposes amendments to §§97.1037, 97.1051, 97.1053, and 97.1055, concerning record review of certain decisions and accreditation statuses and standards. Section 97.1037 establishes procedures for creating an administrative record for review by the State Office of Administrative Hearings (SOAH). Sections 97.1051, 97.1053, and 97.1055 address accreditation statuses and standards, including definitions and purpose. The proposed amendments would add language to include charter schools in the accreditation process under Texas Education Code (TEC), Chapter 39.

During the 79th Texas Legislature, Third Called Session, 2006, House Bill (HB) 1 was passed, which amended the TEC, Chapter 39, Public School System Accountability. The HB 1 changes addressed, in part, the accreditation of school districts; sanctions and interventions for school districts, charter schools, and campuses; and the review by the SOAH of certain sanctions. As a result, the TEA was required to adopt rules to implement the changes addressed.

In January 2008, the TEA notified districts that 19 TAC Chapter 97, Planning and Accountability, Subchapter DD, Investigative Reports, Sanctions, and Record Reviews, had been amended and that 19 TAC Chapter 97, Planning and Accountability, Subchapter EE, Accreditation Status, Standards, and Sanctions, and 19 TAC Chapter 157, Hearings and Appeals, Subchapter EE, Review by State Office of Administrative Hearings: Certain Accreditation Sanctions, had been adopted to establish new and revised rules in compliance with HB 1. The rule actions clarified and codified current TEA practice, as well as the commissioner of education's intent, regarding accreditation issues.

New 19 TAC Chapter 97, Planning and Accountability, Subchapter EE, Accreditation Status, Standards, and Sanctions, adopted to be effective January 6, 2008, included new rules that define the accreditation statuses of Accredited, Accredited-Warned, Accredited-Probation, and Not Accredited-Revoked and state how accreditation statuses will be determined and assigned to school districts. The adoption also established accreditation standards and sanctions, including definitions, purpose, and oversight appointments.

Because they were not included in the School FIRST (Financial Integrity Rating System of Texas) financial accountability rating system, charter schools have not received an accreditation status under the TEC, Chapter 39. The proposed amendments would add language to include charter schools in the accreditation process. The proposed amendments to 19 TAC Chapter 97, Subchapters DD and EE, include the following.

In 19 TAC Chapter 97, Subchapter DD, Investigative Reports, Sanctions, and Record Reviews, §97.1037, Record Review of Certain Decisions, would be amended to add new subsection (a)(5) to apply the request for record review process to a charter school accreditation finding.

In 19 TAC Chapter 97, Subchapter EE, Accreditation Status, Standards, and Sanctions, the following amendments are proposed.

Section 97.1051, Definitions, would be amended to include a charter school campus to the definition of campus and add other definitions to clarify applicability to open-enrollment charter schools. Section 97.1053, Purpose, would be amended to add new subsection (c) to specify applicability to open-enrollment charter schools.

Section 97.1055, Accreditation Status, would be amended to address charter school accreditation by adding new subsection (g) that would establish substitute criteria when considering the financial performance of a charter operator in lieu of a financial accountability rating. The proposed new subsection (g) would also establish the process to be used concerning specific financial accountability findings. In addition, proposed new subsection (h) would be added to address third-party accreditation.

Adrain Johnson, associate commissioner for accreditation, has determined that for the first five-year period the amendments are in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the amendments.

Dr. Johnson has determined that for each year of the first five years the amendments are in effect the public benefit anticipated as a result of enforcing the amendments will be the inclusion of charter schools in the accreditation process under TEC, Chapter 39. Charter schools will be evaluated and given accreditation ratings, which will allow the public to make more informed decisions with regard to the education of children. There is no anticipated economic cost to persons who are required to comply with the proposed amendments.

There is no direct adverse economic impact for small businesses and microbusinesses; therefore, no regulatory flexibility analysis, specified in Texas Government Code, §2006.002, is required.

The public comment period on the proposal begins September 12, 2008, and ends October 13, 2008. Comments on the proposal may be submitted to Cristina De La Fuente-Valadez, Policy Coordination Division, Texas Education Agency, 1701 North Congress Avenue, Austin, Texas 78701, (512) 475-1497. Comments may also be submitted electronically to *rules@tea.state.tx.us* or faxed to (512) 463-0028. A request for a public hearing on the proposal submitted under the Administrative Procedure Act must be received by the commissioner of education not more than 15 calendar days after notice of the proposal has been published in the *Texas Register* on September 12, 2008.

SUBCHAPTER DD. INVESTIGATIVE REPORTS, SANCTIONS, AND RECORD REVIEWS

19 TAC §97.1037

The amendment is proposed under the Texas Education Code (TEC), §12.104, which establishes the applicability of public school accountability under TEC, Chapter 39, to an open-enrollment charter school; TEC, §39.076, which authorizes the agency to adopt written procedures for conducting on-site investigations under TEC, Chapter 39, Subchapter D; TEC, §39.131, which authorizes the commissioner to determine sanctions for a district that does not satisfy accreditation criteria under TEC, §39.071, the academic performance standards under TEC, §39.072, or any financial accountability standard as determined by the commissioner; TEC, §39.132, which authorizes the commissioner to determine sanctions for an under-performing campus; TEC, §39.1321, which authorizes the commissioner to adopt rules to implement procedures to impose any sanction provision under TEC, Chapter 39, as those provisions relate to open-enrollment charter schools; and TEC, §39.302, which authorizes the agency to establish procedures for creating an administrative record for review by the State Office of Administrative Hearings for certain decisions.

The proposed amendment implements the Texas Education Code, §§12.104, 39.076, 39.131, 39.132, 39.1321, and 39.302.

§97.1037. Record Review of Certain Decisions.

(a) Applicability. This section applies only to:

(1) a notice under §97.1035 of this title (relating to Procedures for Accreditation Sanctions) proposing to order:

(A) alternative management of a school district campus or a charter school campus under Texas Education Code (TEC) [~~TEC~~], §39.1327;

(B) - (C) (No change.)

(2) (No change.)

(3) assignment of a board of managers under TEC, §39.136 and §39.131(a)(9), or TEC, §39.1324(c); [~~or~~]

(4) request for review of an over-allocation from an open-enrollment charter school granted by the commissioner of education under §100.1041(e) of this title (relating to State Funding); or [~~.~~]

(5) request for record review of a charter school accreditation finding under §97.1055(g) of this title from an open-enrollment charter school.

(b) - (h) (No change.)

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on August 29, 2008.

TRD-200804697
Cristina De La Fuente-Valadez
Director, Policy Coordination
Texas Education Agency
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For further information, please call: (512) 475-1497

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SUBCHAPTER EE. ACCREDITATION STATUS, STANDARDS, AND SANCTIONS

19 TAC §§97.1051, 97.1053, 97.1055

§97.1051. Definitions.

For purposes under Texas Education Code (TEC), Chapter 39; Subchapter DD of this chapter (relating to Investigative Reports, Sanctions, and Record Reviews); and this subchapter, the following words and terms shall have the following meaning, unless the context clearly indicates otherwise:

(1) Board of trustees--The definition of this term includes a governing body of a charter holder as defined by TEC, §12.1012.

(2) [~~(1)~~] Campus--An organizational unit operated by the school district that is eligible to receive a campus rating in the state accountability rating system under §97.1001 of this title (relating to Accountability Rating System), including a rating of Not Rated--Other or Not Rated--Data Integrity Issues. The definition of this term includes a charter school campus as defined by §100.1011(3)(C) of this title (relating to Definitions).

(3) [~~(2)~~] Campus closure--Cessation of all instructional activity on the campus.

(A) A district ordered to close a campus may apply to the commissioner of education for approval to repurpose a building or facility formerly housing the closed campus.

(B) A building or facility that is approved for repurposing under subparagraph (A) of this paragraph must house a completely different instructional program, bear a new name, and be assigned a new campus identification number.

(C) The commissioner shall not approve the repurposing of a building or facility under subparagraph (A) of this paragraph unless:

(i) all instructional activity under the programs operated at the repurposed building or facility occurs at grade levels not previously served by the closed campus; or

(ii) at least 50% of the students previously served by the closed campus are reassigned to other campuses, the campus administrator is removed or reassigned to other campuses, and at least 75% of the instructional staff employed on the campus are removed or reassigned to other campuses.

(4) Charter school--This term has the meaning assigned by §100.1011(3) of this title. References to a charter school in TEC, Chapter 39, and rules adopted under it, shall mean either the board of trustees or the school district, as appropriate.

(5) Charter school site--This term has the meaning assigned by §100.1011(3)(D) of this title.

(6) [~~(3)~~] Person--This term has the meaning assigned by the Code Construction Act, Government Code, §311.005(2), and includes a school district.

(7) [~~(4)~~] Reconstitution--

(A) The removal or reassignment of some or all campus administrative and/or instructional personnel in accordance with at least the minimum requirements of TEC, §39.1324(b), taking into consideration proactive measures the district or campus has taken regarding campus personnel; and

(B) the implementation of a campus redesign, approved by the commissioner of education, that:

(i) provides a rigorous and relevant academic program;

(ii) provides personal attention and guidance;

(iii) promotes high expectations for all students; and

(iv) addresses comprehensive school-wide improvements that cover all aspects of a school's operations, including, but not limited to, curriculum and instruction changes, structural and managerial innovations, sustained professional development, financial commitment, and enhanced involvement of parents and the community.

(8) School district and district--The definition of these terms includes a charter operator, which is the same as a charter holder as defined by TEC, §12.1012.

§97.1053. Purpose.

(a) The provisions of Texas Education Code (TEC) [~~TEC~~], Chapter 39, and this subchapter shall be construed and applied to achieve the purposes of accreditation statuses assigned under TEC, §39.071, and the purposes of accreditation sanctions, which are to:

(1) - (5) (No change.)

(b) (No change.)

(c) Except as provided by §97.1055(g) of this title, the provisions of TEC, Chapter 39, and this subchapter apply in the same manner to an open-enrollment charter school as to a district.

§97.1055. Accreditation Status.

(a) - (f) (No change.)

(g) Charter school accreditation. In considering the financial performance of a charter operator during a fiscal year for which no financial accountability ratings were assigned to charter operators under §109.1002 of this title, the commissioner shall apply the following substitute criteria.

(1) Finding in lieu of rating. Any of the following findings, made after an opportunity for a record review under paragraph (2)(B) of this subsection, shall be deemed the equivalent of a financial accountability rating of Substandard Achievement or Suspended--Data Quality under §109.1002 of this title:

(A) the Annual Audit Report required for that fiscal year by TEC, §44.008, and §100.1047 of this title (relating to Accounting for State Funds) was received more than 180 days after the close of the entity's fiscal year;

(B) the Annual Audit Report required for that fiscal year by TEC, §44.008, and §100.1047 of this title disclosed net assets of less than 80% of net liabilities; or

(C) the Annual Audit Report required for that fiscal year by TEC, §44.008, and §100.1047 of this title contained:

(i) an adverse opinion, including a going concern disclosure, or a disclaimer of opinion; and

(ii) the adverse or disclaimed opinion that pertained to:

(I) financial resources or expenditures that were not properly documented; or

(II) a material weakness in internal controls that led to the misallocation of financial resources.

(2) Provisions concerning finding. Whenever a provision of this section calls for consideration of the financial accountability rating of a charter operator for a fiscal year, a finding described by paragraph (1) of this subsection shall be deemed the financial accountability

rating and applied as if such finding were issued under §109.1002 of this title.

(A) If a provision of this section calls for consideration of the financial accountability rating of a charter operator for more than one fiscal year, and financial accountability ratings were assigned to charter operators under §109.1002 of this title for at least one but fewer than all of the relevant fiscal years, a finding described by paragraph (1) of this subsection shall be deemed the financial accountability rating only for the fiscal year(s) for which no financial accountability ratings were assigned to charter operators.

(B) A finding described by paragraph (1) of this subsection shall be issued using the process provided by §97.1035 of this title (relating to Procedures for Accreditation Sanctions) and shall be subject to a record review under §97.1037 of this title (relating to Record Review of Certain Decisions).

(C) A finding described by paragraph (1) of this subsection shall be issued pertaining to each fiscal year beginning with the 2007-2008 fiscal year. For the 2006-2007 fiscal year, the TEA shall report the performance of each open-enrollment charter operator for informational purposes only.

(h) Third-party accreditation. The commissioner may recognize a supplemental accreditation issued by a rating agency approved by the commissioner to a charter operator that meets the standards determined by the commissioner under subsection (a)(1)(A) of this section. A charter operator that fails to meet the standards for accreditation under subsection (a)(1)(A) of this section may not receive such recognition until the charter operator meets the standards for the Accredited status as determined by the commissioner.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on August 29, 2008.

TRD-200804698
Cristina De La Fuente-Valadez
Director, Policy Coordination
Texas Education Agency
Earliest possible date of adoption: October 12, 2008
For further information, please call: (512) 475-1497

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CHAPTER 129. STUDENT ATTENDANCE
SUBCHAPTER AA. COMMISSIONER'S RULES

19 TAC §129.1029

The Texas Education Agency (TEA) proposes new §129.1029, concerning the Optional Flexible Year Program (OFYP). The proposed new section would address the provisions for approval and operation of a flexible year program currently codified in 19 TAC §61.1017, Optional Flexible Year Program. The proposed new section would organize the provisions for an OFYP with other rules concerning student attendance and would include a change to remove an existing requirement related to when OFYP applications must be submitted to the TEA.

Texas Education Code (TEC), §29.0821, authorizes the commissioner of education to adopt rules for the administration of flexible year programs provided by school districts and open-enrollment charter schools for students who did not or are likely not to perform successfully on state assessment instruments or who would not otherwise be promoted to the next grade level. Through 19 TAC Chapter 61, School Districts, Subchapter AA, Commissioner's Rules on School Finance, §61.1017, Optional Flexible Year Program, adopted to be effective October 18, 2005, the commissioner exercised rulemaking authority, specifying in rule general provisions, student eligibility, program criteria, approval process, and funding for an OFYP.

In a separate rule action in this issue, the TEA is proposing the repeal of 19 TAC §61.1017 so the provisions for an OFYP can be organized in 19 TAC Chapter 129 with other rules concerning student attendance. Proposed new 19 TAC §129.1029, Optional Flexible Year Program, would be substantively similar to §61.1017 except that it would remove the existing requirement that applications for the OFYP be submitted 90 days before the first day of the proposed instructional calendar in which the district is requesting to implement the program.

Shirley Beaulieu, associate commissioner for finance/chief financial officer, has determined that for the first five-year period the new section is in effect there will be no additional costs for state or local government as a result of enforcing or administering the new section.

Ms. Beaulieu has determined that for each year of the first five years the new section is in effect the public benefit anticipated as a result of enforcing the new section will be the organization of the OFYP rule with other rules concerning student attendance, making it easier for the public to find information on the program. Also, the proposed new section would remove the overly burdensome requirement that applications for the OFYP be submitted 90 days before the first day of the proposed instructional calendar in which the district is requesting to implement the program. There is no anticipated economic cost to persons who are required to comply with the proposed new section.

There is no direct adverse economic impact for small businesses and microbusinesses; therefore, no regulatory flexibility analysis, specified in Texas Government Code, §2006.002, is required.

The public comment period on the proposal begins September 12, 2008, and ends October 13, 2008. Comments on the proposal may be submitted to Cristina De La Fuente-Valadez, Policy Coordination Division, Texas Education Agency, 1701 North Congress Avenue, Austin, Texas 78701, (512) 475-1497. Comments may also be submitted electronically to *rules@tea.state.tx.us* or faxed to (512) 463-0028. A request for a public hearing on the proposal submitted under the Administrative Procedure Act must be received by the commissioner of education not more than 15 calendar days after notice of the proposal has been published in the *Texas Register* on September 12, 2008.

The new section is proposed under the TEC, §29.0821, which authorizes the commissioner of education to adopt rules for the administration of the Optional Flexible Year Program.

The proposed new section implements the TEC, §29.0821.

§129.1029. Optional Flexible Year Program.

(a) General provisions. In accordance with the Texas Education Code (TEC), §29.0821, a school district may modify its instructional calendar to provide a flexible year program to meet the educational needs of its students, including providing intensive instructional services. A school district approved by the commissioner of education

to implement an Optional Flexible Year Program (OFYP) may reduce the number of instructional days for certain students.

(b) Eligibility. A student is eligible to participate in the OFYP if the student meets one or more of the following criteria.

(1) The student did not or is not likely to achieve a passing score on an assessment instrument administered under the TEC, §39.023.

(2) The student is not eligible for promotion to the next grade level.

(c) Program criteria.

(1) A school district may reduce the number of instructional days during the regular school year for students who are not eligible for participation in this program to no fewer than 170 days.

(2) A school district must provide at least 180 days of instruction to those students who meet the eligibility criteria defined in subsection (b) of this section.

(3) In accordance with subsection (d) of this section, a school district may request waivers for no more than five days of staff development or teacher preparation in order to provide additional days of instruction.

(4) A school district that provides transportation services must continue to provide these services during the OFYP.

(5) A school district that participates in the National School Lunch Program or the National School Breakfast Program must continue to provide these services during the OFYP.

(6) A school district may require educational support personnel to provide service as necessary for an OFYP.

(7) Each educator employed under a ten-month contract must provide the minimum days of service required under the TEC, §21.401, notwithstanding the reduction in the number of instructional days or in the number of staff development days.

(d) Approval process. To implement an OFYP, a school district must request prior approval from the commissioner of education.

(1) A school district must submit a letter to the Texas Education Agency division responsible for state funding describing the proposed modifications to the instructional calendar, including a description of the OFYP that will be provided under the TEC, §29.0821. The letter must indicate the date on which the board of trustees approved the modified instructional calendar. If the district is requesting a waiver of staff development days or teacher preparation days, the letter must also indicate that the request to waive staff development days or teacher preparation days has been approved by the campus site-based decision-making committee.

(2) Approval to modify the number of instructional days is limited to one year. Extensions may be approved by submitting subsequent applications.

(3) No approval will be granted that reduces the number of instructional days to fewer than 170 days.

(4) The commissioner may require a school district to provide an evaluation that demonstrates the success of its approach as a condition of approval.

(e) Funding. For a school district that operates an OFYP, the calculation of average daily attendance is modified to reflect the approved instructional calendar. For students placed on a reduced instructional calendar, the reported number of days of instruction used as the divisor in calculating average daily attendance must reflect the reduced number of days (no fewer than 170). For eligible students served through the OFYP, the reported number of days of instruction used as the divisor in calculating average daily attendance must reflect the scheduled number of days (180 or more) in which instruction took place.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on August 29, 2008.

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Cristina De La Fuente-Valadez
Director, Policy Coordination
Texas Education Agency
Earliest possible date of adoption: October 12, 2008
For further information, please call: (512) 475-1497

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TITLE 22. EXAMINING BOARDS

PART 14. TEXAS OPTOMETRY BOARD

CHAPTER 280. THERAPEUTIC OPTOMETRY

22 TAC §280.8

The Texas Optometry Board proposes amendments to §280.8, concerning skill evaluation requirements for the optometric glaucoma specialist application. The amendments allow applicants to have the required skills evaluation performed by an ophthalmologist or optometric glaucoma specialist.

Chris Kloeris, Executive Director of the Texas Optometry Board, has determined that for the first five-year period the amendments are in effect, there will be no fiscal implications for state and local government as a result of enforcing or administering the amendments.

Mr. Kloeris also has determined that for each of the first five years the amendments are in effect, the public benefit anticipated as a result of enforcing the amendments will be that applicants for an optometric glaucoma specialist license will have an alternative method of obtaining the required documentation that must be submitted to the agency.

Economic Impact Statement and Regulatory Flexibility Analysis

The Board licenses approximately 3,600 optometrists and therapeutic optometrists. Approximately 2,900 have active licenses. A significant majority of licensees own or work in one or more of the 1,000 to 3,000 optometric practices which meet the definition of a small business. Some of these practices meet the definition of a micro business. The Board does not license these practices.

It is anticipated that there will be no economic costs for persons or businesses who are required to comply with the amendments. No disparate effect is foreseen on small or micro-businesses.

Comments on the proposal may be submitted to Chris Kloeris, Executive Director, Texas Optometry Board, 333 Guadalupe Street, Suite 2-420, Austin, Texas 78701-3942. The deadline for furnishing comments is 30 days after publication in the *Texas Register*.

The amendments are proposed under the Texas Optometry Act, Texas Occupations Code, §351.151 and §351.3581. The Texas Optometry Board interprets §351.151 as authorizing the adop-

tion of procedural and substantive rules for the regulation of the optometric profession. Section 351.3581 sets the requirements for optometric glaucoma specialist license.

No other sections are affected by the amendments.

§280.8. Optometric Glaucoma Specialist: Required Education, Examination and Clinical Skills Evaluation.

(a) - (c) (No change.)

(d) Clinical Skills Evaluation. Each applicant for licensure as an optometric glaucoma specialist shall submit a signed and dated certification prepared by a licensed ophthalmologist or optometric glaucoma specialist. The certification shall confirm the demonstration by the applicant in an adequate and appropriate manner, as directly observed by the ophthalmologist or optometric glaucoma specialist, of the following skills:

(1) - (5) (No change.)

(e) Applicants Graduating from Curriculums Which Include Course Work. An applicant shall be considered as having met the requirements of subsections (a) - (c) of this section, provided:

(1) (No change.)

(2) Clinical Skills Evaluation. Each [~~Notwithstanding subsection (d) of this section, each~~] applicant meeting the requirements of paragraph (3) of this subsection shall submit a signed and dated certification prepared by a licensed ophthalmologist or optometric glaucoma specialist. The certification shall confirm the demonstration by the applicant in an adequate and appropriate manner, as directly observed by the ophthalmologist or optometric glaucoma specialist, of the following skills:

(A) - (E) (No change.)

(3) (No change.)

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on August 26, 2008.

TRD-200804631
Chris Kloeris
Executive Director
Texas Optometry Board
Earliest possible date of adoption: October 12, 2008
For further information, please call: (512) 305-8502

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TITLE 25. HEALTH SERVICES

PART 1. DEPARTMENT OF STATE HEALTH SERVICES

CHAPTER 140. HEALTH PROFESSIONS REGULATION

SUBCHAPTER H. MASSAGE THERAPISTS

The Executive Commissioner of the Health and Human Services Commission, on behalf of the Department of State Health Services (department), proposes new §§140.300 - 140.307, 140.310 - 140.315, 140.320 - 140.324, 140.330 - 140.351, 140.360 - 140.365, and 140.370 - 140.376, concerning the licensing and regulation of massage therapists, massage therapy instructors, massage schools, and massage establishments.

BACKGROUND AND PURPOSE

The proposed repeal of §§141.1 - 141.3, 141.5 - 141.7, 141.10, 141.11, 141.13 - 141.17, 141.20 - 141.47, 141.50 - 141.55, and 141.60 - 141.66 and new rules are necessary to consolidate existing Professional Licensing and Certification Unit program rules in 25 TAC Chapter 140, Health Professions Regulation. The new rules transfer and update existing language, and include substantive changes to implement portions of House Bill (HB) 2644, 80th Legislature, Regular Session (2007) which amended Occupations Code, Chapter 455, as well as other changes to update, strengthen, and clarify the rules.

Proposed changes which implement HB 2644 include an increase in the minimum educational standard for a massage therapist license from 300 to a minimum of 500 hours and extensive corresponding changes and clarifications to the requirements for licensed massage schools; elimination of the requirement for a practical examination; elimination of the independent massage therapy instructor license; elimination of language relating to licensure of unlicensed applicants from another state where licensure is not available; new language relating to examinations; and new language which mirrors the statute relating to exemptions from licensure for certain massage establishments.

Additional changes include the approval of online and correspondence courses in non-massage therapy technique subjects for continuing education credit, a requirement that a licensee to honor or refund an unexpired gift certificate, a new requirement that a massage establishment maintain additional records, including a list of current employees and contractors along with proof of eligibility to work in the United States at all times and provide it to the department upon request, and a new requirement for a jurisprudence examination for new applicants for a license as a massage therapist, massage establishment, or preapproved continuing education provider starting in 2009.

Government Code, §2001.039, requires that each state agency review and consider for readoption each rule adopted by that agency pursuant to the Government Code, Chapter 2001 (Administrative Procedure Act). Sections 141.1 - 141.3, 141.5 - 141.7, 141.10, 141.11, 141.13 - 141.17, 141.20 - 141.47, 141.50 - 141.55, and 141.60 - 141.66 have been reviewed and the department has determined that reasons for adopting the sections continue to exist because rules on this subject are needed; however, the department is proposing to repeal the existing sections and adopt the rules in 25 TAC Chapter 140, Health Professions Regulation.

SECTION-BY-SECTION SUMMARY

New §140.300 includes definitions for terms used within the rules, including new subject areas taught by massage schools, massage therapist, and what constitutes compensation. New §140.301 lists the fees required for new applications, renewals and late renewals, license and identification card replacements, returned checks, and name changes for all license types. The new reduced fee for massage schools which must now also hold a massage establishment license is included. New §140.302 provides timelines for the processing of initial and renewal applications, and for refunds to be issued if the timelines are exceeded without sufficient cause. New §140.303 sets forth general ethical standards and imposes a new requirement that licensees not make false or misleading claims about their

services, their qualifications, or the field of massage therapy. New §140.304 is a new section with existing language which describes and emphasizes the required consultation document. New §140.305 sets forth prohibitions on sexual misconduct. New language also explicitly prohibits misconduct by a student, forbids kissing, and requires that female clients consent in writing before breast massage may be performed. New §140.306 establishes standards for advertising. New language requires a massage establishment to include their license number in all advertising, and clarifies that a student's endorsement of a school as defined by rule does not constitute a prohibited testimonial. New §140.307 provides for the issuance of license certificates. New §140.310 describes application procedures and lists qualifications for a license as a massage therapist. It includes the new requirement for a minimum 500-hour course of instruction for initial licensure. It eliminates a prior requirement for a massage therapist licensed in another state with substantially equivalent requirements to have held that license for two years prior to applying for a Texas license. New §140.311 sets forth application procedures and documentation requirements for licensure as a massage therapist. New §140.312 describes application procedures and lists qualifications for a provisional license as a massage therapist. New §140.313 sets forth the examination requirements for licensure as a massage therapist. It includes new language related to the national and the jurisprudence examinations and the requirements during the transitional period prior to the effective date of the new requirement. Language related to oral interpretation of the examination into other languages is being eliminated. New §140.314 includes information concerning massage therapist license renewal and late renewal. New §140.315 includes information on renewal procedures for a licensed massage therapist on active military duty. New §140.320 sets forth the number of hours of continuing education required for renewal of a massage therapist license. New §140.321 sets forth standards for acceptable continuing education. New language is included to allow any subject taught in the expanded minimum 500-hour course of instruction to be accepted as continuing education, to allow online continuing education in non-technique subject areas, and to accept continuing education taken out of state which has been pre-approved by the national certification board. It limits the amount of continuing education credit allowed for CPR and/or First Aid certification to a total of six hours each renewal period and requires CPR and First Aid instructors to be appropriately certified. New §140.322 sets limits on unacceptable continuing education. New §140.323 provides for approval of continuing education providers. New language requires that all subjects taught be included on continuing education certificates, and establishes a new requirement for pre-approved providers to pass the jurisprudence examination. New §140.324 sets forth procedures for reporting continuing education. New §140.330 includes general provisions related to massage schools, including inspections. New language allows a maximum of two years, rather than one year, before an unannounced inspection of a massage school is required, in order to match the two-year renewal term. New §140.331 describes application procedures and lists qualifications for a license as a massage school. New §140.332 concerns massage school administrative personnel. New §140.333 concerns massage school instructors. New language increases the experience requirement for initial licensure from 250 hours to 500 hours of massage. New language requires CPR and First Aid instructors to be appropriately certified. New §140.334 sets out standards for financial stability for massage schools. New §140.335 relates to procedures for a change in massage school ownership. New §140.336 includes information concerning massage school license renewal and late renewal. New §140.337 concerns massage school locations. New language is included to allow an emergency approval for a change of instructional location due to circumstances beyond the control of the massage school. New §140.338 sets out updated standards for the massage school curriculum and internship. New language sets forth standards for the department to approve and for a school to offer up to twice the minimum 500 hours of instruction required for licensure provided a student is given notice that the program exceeds the minimum number of hours required for licensure and is offered a choice of a minimum 500 hour or a longer program; allows a student to begin internship after completing a minimum of 250 hours of internship, including at least 100 hours of massage therapy; limits the internship to a maximum of 120 hours; and emphasizes that a school may not require or allow a student to complete instruction hours for compensation. New §140.339 authorizes massage schools to offer advanced course work. New language emphasizes that the massage school may not represent that these advanced programs are approved by the department, and that the massage school may not allow unlicensed persons to provide massage therapy to the public. New §140.340 relates to massage school admission requirements. New language requires schools to keep proof of CPR and/or First Aid certification if accepted for credit of up to six hours. New §140.341 includes massage school enrollment procedures. New §140.342 concerns massage school tuition and fees. New language emphasizes that a massage school may not allow a student to engage in the unlicensed practice of massage in order to pay for school expenses. New §140.343 relates to the requirement for a massage school conduct policy. New §140.344 establishes standards for massage school cancellation and refund policies. New §140.345 sets forth standards for massage school minimum progress standards. New §140.346 relates to massage school attendance standards. New §140.347 sets forth massage school equipment and facility requirements. New §140.348 relates to massage school transcripts and records. New language requires a licensee to provide a transcript to a student who has satisfied the terms of his/her enrollment agreement within 10 calendar days. New language also requires that the student authorize the release of transcripts. New §140.349 requires a massage school to establish and adhere to a grievance policy. New language is added to forbid a massage school from retaliating against a student who files a complaint with the department. New §140.350 relates to fire safety for massage schools. New §140.351 sets forth standards for massage school sanitation. New §140.360 concerns application and licensure procedures for massage establishments. New language requires establishments to submit a list of all establishment owners, directors, managers, employees and contractors, and their birth dates for all persons associated with the establishment, to the department, and establishes a new requirement for massage establishment owners to pass the jurisprudence examination. New §140.361 sets forth general requirements for massage establishments. New language requires establishments to maintain specific documents, including proof of eligibility to work in the United States for all employees or contractors providing massage therapy or other massage services. New language also requires the establishment to maintain a current list of all establishment employees and contractors, to maintain all previous lists for a period of two years, and to provide the list to the department upon request. New language also forbids kissing and requires that female clients

consent in writing before breast massage may be performed. New §140.362 sets forth standards for massage establishment sanitation. New §140.363 relates to massage establishment license renewal. New language requires establishments to submit proof of a current fire inspection at each renewal. New §140.364 contains all new language which reiterates the new language in the statute limiting the exemptions for licensure as a massage establishment. New §140.365 concerns massage establishment change or ownership or change of location. New §140.370 sets forth procedures for filing complaints. New §140.371 concerns the investigation of complaints. New §140.372 sets forth the grounds for denial of a license and disciplinary action. New §140.373 relates to formal hearings. New §140.374 sets forth procedures for suspension of a license for failure to pay child support. New §140.375 relates to informal disposition. New §140.376 sets forth standards for the licensing of persons with a criminal background.

FISCAL NOTE

Cindy Bourland, Manager, Professional Licensing and Certification Unit, has determined that for each year of the first five-year period that the sections are in effect, there will be fiscal implications to state government as a result of enforcing or administering the sections as proposed. The effect on state government will be an increase in revenue of $135,000 each fiscal year 2008 - 2012. There will be no fiscal implications to local government. Additional fees will be received for the issuance and renewal of massage therapy establishment licenses to businesses formerly exempt from licensure. Issuance of additional licenses, and additional massage establishment inspections will be required.

SMALL AND MICRO-BUSINESS IMPACT ANALYSIS

Ms. Bourland has also determined that there will be an effect on small businesses or micro-businesses required to comply with the sections as proposed. This determination was made because additional fees will be required for the issuance and renewal of massage therapy establishment licenses to businesses formerly exempt from licensure. Regarding §140.364, there is an anticipated economic cost to businesses which are required to comply with the sections as proposed of $300 every two years. There will be an economic impact to massage therapy schools due to schools being allowed to offer massage therapy educational programs which exceed 500 hours of instruction, which is the minimum number of hours required for massage therapist licensure. The extent of the impact cannot be estimated because applying for approval to offer these programs is voluntary and the availability of these longer programs may have varying positive and/or negative effects on the revenue and costs of individual schools. There is no anticipated negative impact on local employment.

ECONOMIC IMPACT STATEMENT

Regarding §140.364, the purpose of the rule is to clearly set forth any exemptions to the requirement for a business to hold a massage establishment license. The rule language as proposed exactly repeats the language in HB 2644, which also eliminated the department's authority to adopt rules granting additional exemptions. An estimated 900 small or micro-businesses will be required to comply with the rules as proposed. Less than 100 of these small businesses are already licensed as massage schools.

REGULATORY FLEXIBILITY ANALYSIS

The department considered the following regulatory options in determining how to implement the new requirement for formerly unlicensed businesses to hold a massage establishment license. Regarding §140.364, the options not chosen included not adopting the rule and establishing different, less burdensome standards for the operation of small businesses. It was determined that failure to adopt rules would result in unclear rules, which could subject unaware businesses to criminal prosecution for operating without a license under the statute. It was also determined that failure to adopt and enforce uniform rules related to the standards for the operation of a massage establishment could pose a risk to public health, as most currently licensed massage establishments are also small businesses. It was however determined that licensed massage schools were already paying inspection fees, so the proposed establishment fees for these small businesses which also operate massage establishments were decreased from $300 to $100. The department is also working to bring businesses subjected to the new requirements in HB 2644 into voluntary compliance over the course of the next year, and therefore anticipates a delay in the imposition of the fees to approximately 450 affected businesses.

PUBLIC BENEFIT

In addition, Ms. Bourland has also determined that for each year of the first five years the sections are in effect, the public will benefit from the adoption of the sections. The public benefit anticipated as a result of enforcing or administering the sections is to continue to ensure public health and safety through the licensing and regulation of massage therapists, massage therapy instructors, massage schools, and massage establishments.

REGULATORY ANALYSIS

The department has determined that this proposal is not a "major environmental rule" as defined by Government Code, §2001.0225. "Major environmental rule" is defined to mean a rule the specific intent of which is to protect the environment or reduce risk to human health from environmental exposure and that may adversely affect, in a material way, the economy, a sector of the economy, productivity, competition, jobs, the environment or the pubic health and safety of a state or a sector of the state. This proposal is not specifically intended to protect the environment or reduce risks to human health from environmental exposure.

TAKINGS IMPACT ASSESSMENT

The department has determined that the proposal does not restrict or limit an owner's right to his or her property that would otherwise exist in the absence of government action and, therefore, does not constitute a taking under Government Code, §2007.043.

PUBLIC COMMENT

Comments on the proposal may be submitted to Yvonne Feinleib, Program Director, Massage Therapy Licensing Program, Professional Licensing and Certification Unit, Division for Regulatory Services, Department of State Health Services, 1100 West 49th Street, Austin, Texas 78756, (512) 834-6616 or by e-mail to massage@dshs.state.tx.us. When e-mailing comments, please indicate "Comments on Proposed Rules" in the subject line. Comments will be accepted for 30 days following publication of the proposal in the *Texas Register*.

LEGAL CERTIFICATION

The Department of State Health Services General Counsel, Lisa Hernandez, certifies that the proposed rules have been reviewed by legal counsel and found to be within the state agencies' authority to adopt.

DIVISION 1. THE DEPARTMENT

25 TAC §§140.300 - 140.302

STATUTORY AUTHORITY

The proposed new rules are authorized by Occupations Code, §455.051, which authorizes the adoption of rules regarding massage therapists, massage therapy instructors, massage schools, and massage establishments; and Government Code, §531.0055, and Health and Safety Code, §1001.075, which authorize the Executive Commissioner of the Health and Human Services Commission to adopt rules and policies necessary for the operation and provision of health and human services by the department and for the administration of Health and Safety Code, Chapter 1001. Review of the rules implements Government Code, §2001.039.

The proposed new rules affect the Occupations Code, Chapter 455; Government Code, Chapters 531 and 2001; and Health and Safety Code, Chapter 1001.

§140.300. Definitions.

The following words and terms, when used in this subchapter, shall have the following meanings, unless the context clearly indicates otherwise. Words and terms defined in the Texas Occupations Code, Chapter 455 (the Act relating to the regulation of massage therapy) shall have the same meaning in this subchapter as assigned in the Act.

(1) Act--Texas Occupations Code, Chapter 455, relating to the regulation of massage therapists, massage therapy instructors, massage schools and massage establishments.

(2) Anatomy--The study of the structure of the human body including the following areas: bones, joints and muscles, the skin, blood and blood vessels, cells, tissues and membranes, the heart, the brain, spinal cord and nerves, the lymphatic system, the digestive system, the respiratory system, the urinary system, the reproductive system, glands and hormones.

(3) Business practices and professional ethics--The study of standard bookkeeping and accounting practices, office practices, and advertising, and ethical guidelines for massage therapists established by law or the department.

(4) Client--An individual or patron seeking or receiving massage therapy services.

(5) Commissioner--The Commissioner of the Department of State Health Services.

(6) Compensation--Any and all forms of payment as remuneration for the provision of massage therapy or other massage therapy services, including but not limited to, fees, tips, memberships, goods, services, barter, or any other exchange or any value made to or on behalf of a licensee, an unlicensed person, or an unlicensed business. Compensation includes discounted, reduced, or waived student fees for tuition, books, supplies, or other educational expenses.

(7) Department--Department of State Health Services.

(8) Executive Commissioner--The Executive Commissioner of the Health and Human Services Commission.

(9) Health and hygiene--The study of recognized methods of sanitation and cleanliness including prophylaxis or disease prevention as applied to massage therapy services and current knowledge of elements of healthy life styles.

(10) Hydrotherapy--The use of generally accepted methods of external application of water for its mechanical, thermal, or chemical effect.

(11) Instructor--A person employed at a licensed massage school who instructs one or more students in any section of the course of instruction, other than massage therapy techniques, manipulation of soft tissue, or the internship.

(12) Kinesiology--The study of the anatomy, physiology, and mechanics of movement of the human body.

(13) Licensee--A person or entity licensed under the Act as a massage therapist, massage school, massage therapy instructor, or massage establishment.

(14) Massage therapist--A person who practices or administers massage therapy or other massage services to a client for compensation. The term includes a licensed massage therapist, therapeutic massage practitioner, massage technician, masseur, masseuse, myotherapist, body massager, body rubber, or any derivation of those titles.

(15) Massage therapy--The manipulation of soft tissue by hand or through a mechanical or electrical apparatus for the purpose of body massage. The term includes effleurage (stroking), petrissage (kneading), tapotement (percussion), compression, vibration, friction, nerve strokes, and Swedish gymnastics. Massage therapy may include the use of oil, lubricant, salt glows, heat lamps, hot and cold packs, or tub, shower, jacuzzi, sauna, steam or cabinet baths. Equivalent terms for massage therapy are massage, therapeutic massage, massage technology, myo-therapy, body massage, body rub, or any derivation of those terms. Massage therapy is a health care service when the massage is for therapeutic purposes. The terms "therapy" and "therapeutic" do not include diagnosis, the treatment of illness or disease, or any service or procedure for which a license to practice medicine, chiropractic, physical therapy, or podiatry is required by law. Massage therapy does not constitute the practice of chiropractic.

(16) Massage therapy educational program--The minimum 500 hour supervised course of instruction described in the Act, §455.156, required for licensure and provided by a licensed massage school.

(17) Massage therapy establishment--A place of business that advertises or offers massage therapy or other massage services unless specifically exempted by the Act. The term includes a place of business that advertises or offers any service described by a derivation of the terms "massage therapy" or "other massage services" as defined by the Act.

(18) Massage therapy instructor--A licensed massage therapist who provides to one or more students instruction approved by the department in massage therapy or manipulation of soft tissue and who holds a license issued by the department as a massage therapy instructor.

(19) Owner--An owner is, in the case of a massage therapy school or establishment, an individual, a partnership and any partners, a corporation, or any other legal business entity.

(20) Pathology--The scientific study of the nature of disease and its causes, processes, development, and consequences.

(21) Physiology--The study of the normal vital processes of the human body including the processes of cells, tissues, and organs

including the contractibility of muscle tissue; coordination through the nervous system; digestion; circulatory; reproduction; and secretions.

(22) State approved educational institution--An institution which is approved by the Texas Education Agency or which is an institution of higher education as defined in the Texas Codes Annotated, Texas Education Code, Chapter 61 or a higher education institution approved by a similar agency in another state.

(23) Swedish gymnastics--Passive and active joint movements, nonspecific stretches, passive and active exercise, or any combination of these.

(24) Swedish massage therapy techniques--The manipulation of soft tissue utilizing effleurage (stroking), petrissage (kneading), tapotement (percussion), compression, vibration, friction, nerve stroke, and Swedish gymnastics.

§140.301. Fees.

(a) All fees are non-refundable and shall be submitted in the form of a personal check, certified check or money order made payable to the Department of State Health Services.

(b) For all applications and renewal applications, the department is authorized to collect subscription and convenience fees, in amounts determined by the Texas Online Authority, to recover costs associated with application and renewal application processing through Texas Online.

(c) The fees related to the licensure of massage therapists are as follows:

(1) application fee--$106;

(2) examination fee--to be determined by the testing agency approved by the department to administer the examination plus an administrative fee determined by the department at the time the applicant is scheduled for an examination;

(3) re-examination fee--to be determined by the testing agency approved by the department to administer the examination plus an administrative fee determined by the department at the time the applicant is to be rescheduled for an examination;

(4) fee for a renewal license issued for a two-year period--$100;

(5) late renewal fees;

(A) a fee that is equal to one and one-half times the normally required renewal fee when renewed on or within 90 days of expiration; or

(B) a fee that is equal to two times the normally required renewal fee when renewed more than 90 days, but less than one year after expiration.

(d) The fees related to massage establishments are as follows:

(1) massage establishment application fee:

(A) for each massage school primary instructional location or approved additional location--$100;

(B) for all other applicants--$300;

(2) fee for a renewal license issued for a two-year period:

(A) for each massage school primary instructional location or approved additional location--$100;

(B) for all other renewal applicants--$300;

(3) late renewal fees:

(A) a fee that is equal to one and one-half times the normally required renewal fee when renewed on or within 90 days of expiration; or

(B) a fee that is equal to two times the normally required renewal fee when renewed more than 90 days, but less than one year after expiration.

(e) The fees related to massage schools offering the minimum 500-hour supervised course of instruction for licensure are as follows:

(1) application and licensure fee (includes initial inspection and any subsequent inspections)--$2,800;

(2) fee for a renewal license issued for a two-year period (includes inspections)--$2,000;

(3) late renewal fees:

(A) a fee that is equal to one and one-half times the normally required renewal fee when renewed on or within 90 days of expiration; or

(B) a fee that is equal to two times the normally required renewal fee when renewed more than 90 days, but less than one year after expiration.

(4) change of instructional address for main campus (includes inspections)--$375; and

(5) application and renewal fee for an additional educational program location separate from the main campus (includes initial inspection and any subsequent inspections)--$750.

(f) The fees related to massage therapy instructors are as follows:

(1) application and licensure fee--$200;

(2) fee for a renewal license issued for a two-year period--$200;

(3) late renewal fees for massage therapy instructors;

(A) a fee that is equal to one and one-half times the normally required renewal fee when renewed on or within 90 days of expiration; or

(B) a fee that is equal to two times the normally required renewal fee when renewed more than 90 days, but less than one year after expiration.

(g) The fees related to pre-approved providers for continuing education are as follows:

(1) application fee--$200;

(2) fee for a renewal license issued for a two-year period--$200.

(h) License and identification card replacement fee--$20.

(i) Returned check fee--$25.

(j) Fee for name change--$20.

§140.302. Processing Applications.

(a) The following periods of time shall apply from the date of receipt of an application until the date of issuance of a written notice that the application is complete and accepted for filing or that the application is deficient and additional specific information is required. A written notice stating that the application has been approved may be sent in lieu of the notice of acceptance of a complete application. The time periods are as follows:

(1) letter of acceptance of application for massage therapist license--20 working days;

(2) letter of application or renewal deficiency--20 working days;

(3) issuance of license renewal after receipt of documentation of all renewal requirements--10 working days; and

(4) letter of acceptance or notice of deficiency of application for massage school, massage therapy instructor, or massage establishment license--30 working days.

(b) The following periods of time shall apply from the receipt of the last item necessary to complete the application until the date of issuance of written notice approving or denying the application. The time periods for denial include notification of the proposed decision and of the opportunity, if required, to show compliance with the law and of the opportunity for a formal hearing. An application is not considered complete until the required examination has been successfully completed by the applicant. The time periods are as follows:

(1) notice of approval for examination--20 working days;

(2) initial letter of approval for licensure--30 days;

(3) letter of denial of licensure--30 days; and

(4) issuance of license renewal after receipt of documentation of all renewal requirements--10 working days.

(c) In the event an application is not processed in the time periods stated in subsection (a) of this section, the applicant has the right to request reimbursement of all fees paid in that particular application process. If the department does not agree that the time period has been violated or finds that good cause existed for exceeding the time period, the request will be denied. Good cause for exceeding the time period is considered to exist if the number of applications for licensure and licensure renewal exceeds by 15% or more the number of applications processed in the same calendar quarter the preceding year; another public or private entity relied upon by the department in the application process caused the delay; or any other condition exists giving the department good cause for exceeding the time period.

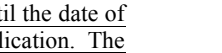
(d) If a request for reimbursement under subsection (c) of this section is denied by the department, the applicant may appeal to the commissioner of the department for a timely resolution of any dispute arising from a violation of the time periods. The applicant shall give written notice to the commissioner at the address of the department that he or she requests full reimbursement of all fees paid because his or her application was not processed within the applicable time period. The department shall submit a written report of the facts related to the processing of the application and of any good cause for exceeding the applicable time period. The commissioner shall provide written notice of the commissioner's decision to the applicant. An appeal shall be decided in the applicant's favor if the applicable time period was exceeded and good cause was not established. If the appeal is decided in favor of the applicant, full reimbursement of all fees paid in that particular application process shall be made.

(e) The time periods for contested cases related to the denial of licensure or licensure renewals are not included within the time periods stated in subsection (a) of this section. The time period for conducting a contested case hearing runs from the date the department receives a written request for a hearing and ends when the decision of the department is final and appealable. A hearing may be completed within one to four months, but may extend for a longer period of time depending on the particular circumstances of the hearing.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on August 26, 2008.

TRD-200804643
Lisa Hernandez
General Counsel
Department of State Health Services
Earliest possible date of adoption: October 12, 2008
For further information, please call: (512) 458-7111 x6972



DIVISION 2. CODE OF ETHICS

25 TAC §§140.303 - 140.307

STATUTORY AUTHORITY

The proposed new rules are authorized by Occupations Code, §455.051, which authorizes the adoption of rules regarding massage therapists, massage therapy instructors, massage schools, and massage establishments; and Government Code, §531.0055, and Health and Safety Code, §1001.075, which authorize the Executive Commissioner of the Health and Human Services Commission to adopt rules and policies necessary for the operation and provision of health and human services by the department and for the administration of Health and Safety Code, Chapter 1001. Review of the rules implements Government Code, §2001.039.

The proposed new rules affect the Occupations Code, Chapter 455; Government Code, Chapters 531 and 2001; and Health and Safety Code, Chapter 1001.

§140.303. General Ethical Requirements.

(a) A licensee shall not make deceptive, untrue, or fraudulent representations in the practice of massage therapy or employ a trick or scheme in the practice of massage therapy, including, but not limited to, warranty of results of such services and false claims of proficiency in any field.

(b) A licensee shall not use a work area, equipment or clothing that is unclean or unsanitary.

(c) A licensee shall not practice massage therapy fraudulently, with gross incompetence, with gross negligence on a particular occasion, or with negligence or incompetence on more than one occasion.

(d) A licensee shall bill clients or third parties for only those services actually rendered or as agreed to by mutual understanding at the beginning of services or as later modified by mutual agreement. A licensee must either honor an unexpired gift certificate issued by that licensee or provide a full refund.

(e) For each client, a licensee shall keep accurate records of the dates of massage therapy services, types of massage therapy and billing information. Such records must be maintained for a minimum of two years.

(f) A licensee must obtain the written consent of a parent or guardian to provide massage therapy services to a person under the age of 17.

(g) On the written request of a client, a client's guardian, or a client's parent if the client is under the age of 17, a licensee shall provide a written explanation of the charges for massage therapy services

previously made on a bill or statement of the client. This requirement applies even if the charges are to be paid by a third party.

(h) A licensee shall not abuse alcohol or drugs in any manner which detrimentally affects the provision of massage therapy or massage therapy instruction.

(i) A licensee may not persistently or flagrantly overcharge or over treat a client.

(j) A licensee shall not practice in an unlicensed massage establishment or massage school.

(k) A licensee shall not allow an unlicensed person to engage in activity for which licensure is required.

(l) A licensee shall not provide false information on material submitted to the department.

(m) A licensee shall not interfere with a department investigation by the willful misrepresentation of facts to the department or its authorized representative, or by the use of threats, retaliation, or harassment against any person.

(n) A licensee shall comply with any formal order issued by the department relating to the licensee.

(o) A licensee shall be subject to disciplinary action by the department if the licensee is issued a public letter of reprimand, is assessed a civil penalty by a court, or has an administrative penalty imposed by the attorney general's office under the Texas Code of Criminal Procedure, §56.31.

(p) A licensee shall notify each client of the name, mailing address, and telephone number of the department for the purpose of directing complaints to the department by providing notification:

(1) on each written contract for services of a licensee; or

(2) on a sign prominently displayed in the primary place of business of each licensee; or

(3) on a bill for service provided by a licensee to a client or third party; or

(4) by another written and documented method.

(q) A licensee shall keep his or her licensure file updated by notifying the department, in writing, of changes of names, address, telephone number and employment.

(r) A licensee shall be subject to disciplinary action for failure to truthfully respond in a manner that fully discloses all information in an honest, materially responsive, and timely manner to a complaint filed with or by the department.

(s) A licensee shall not make any false, misleading, deceptive, fraudulent, or exaggerated claim or statement about the licensee's services, including, but not limited to:

(1) the effectiveness of services;

(2) the licensee's qualifications, capabilities, background, training, experience, education, certification or licensure, professional affiliations, fees, products, or publications; or

(3) the practice or field of massage therapy.

§140.304. Consultation Document.

(a) A licensee shall provide an initial consultation to each client(s) prior to the first massage therapy session and obtain the signature of the client on the consultation document. The consultation document shall include:

(1) the type of massage therapy services or techniques the licensee anticipates using during the massage therapy session;

(2) the parts of the client's body that will be massaged or the areas of the client's body that will be avoided during the session, including indications and contraindications;

(3) a statement that the licensee shall not engage in breast massage of female clients without the written consent of the client;

(4) a statement that draping will be used during the session, unless otherwise agreed to by both the client and the licensee;

(5) a statement that if uncomfortable for any reason, the client may ask the licensee to cease the massage and the licensee will end the massage session; and

(6) the signature of both the client and the licensee.

(b) If the client's reason for seeking massage therapy changes at any time and any of the information in subsection (a)(1) - (4) of this section is modified, the licensee must provide an updated consultation reflecting any changes and modifications to the techniques used or the parts of the client's body to be massaged.

§140.305. Sexual Misconduct.

(a) A licensee shall not engage in sexual contact during a session with a client. For the purposes of this section, sexual contact includes:

(1) any touching of any part of the genitalia or anus;

(2) any touching of the breasts of a female client, unless the touching is breast massage that is specifically authorized by the client through the signed consultation document referenced in §140.304(a)(3) of this title (relating to Consultation Document);

(3) any offer or agreement to engage in any activity described in paragraph (1) or (2) of this subsection;

(4) kissing;

(5) deviate sexual intercourse, sexual contact, sexual intercourse, indecent exposure, sexual assault, prostitution, and promotion of prostitution as described in the Texas Penal Code, Chapters 21, 22, and 43, or any offer or agreement to engage in any such activities; or

(6) any behavior, gestures, or expressions which may reasonably be interpreted as inappropriately seductive or sexual;

(7) inappropriate sexual comments about or to a client, including making sexual comments about a person's body.

(b) A licensee shall not allow any individual, including a client, student, licensee, employee, participant in a continuing education program, or one's self to engage in sexual contact on the premises of any massage school, massage establishment, or the licensee's own place of business.

(c) A licensee shall not allow any individual, including a student, licensee, employee, or one's self to practice massage therapy or provide other massage therapy services in the nude, while partially nude, or in clothing designed to arouse or gratify the sexual desire of any individual.

(d) A licensee shall not perform massage therapy, whether or not for compensation, at or for a sexually oriented business.

(e) A licensee shall immediately discontinue the massage therapy session, activity or the professional relationship when a client initiates any verbal or physical contact with the licensee that is intended to arouse or gratify the sexual desire of either person.

§140.306. Advertising.

(a) A person, including a massage therapy instructor, a massage school, a massage therapist, or massage establishment, who is not licensed under the Act, shall not use the word "massage" on any sign, display, or other form of advertising unless the person is expressly exempt from the license requirements of the Act. Under no circumstances may a sexually oriented business use the word "massage" or "bath" on any sign or other form of advertising.

(b) A licensee shall not use advertising that is false, misleading, or deceptive or that is not readily subject to verification. False, misleading, or deceptive advertising or advertising that is not readily subject to verification includes advertising that:

(1) makes a material misrepresentation of fact or omits a fact necessary to make the statement as a whole not materially misleading;

(2) makes a representation likely to create an unjustified expectation about the results of a health care service or procedure;

(3) compares a health care professional's services with another health care professional's services unless the comparison can be factually substantiated;

(4) contains a testimonial;

(5) causes confusion or misunderstanding as to the credentials, education, or licensure of a health care professional;

(6) advertises or represents that health care insurance deductibles or copayments may be waived or are not applicable to health care services to be provided if the deductibles or copayments are required;

(7) advertises or represents that the benefits of a health benefit plan will be accepted as full payment when deductibles or copayments are required;

(8) makes a representation that is designed to take advantage of the fears or emotions of a particularly susceptible type of client; or

(9) advertises or represents in the use of a professional name, title or professional identification that is expressly or commonly reserved to or used by another profession or professional.

(c) When an assumed name is used in a person's practice as a massage therapist, the full legal name of the massage therapist or license number of the massage therapist must be listed in each advertisement and each time the business name or assumed name appears in writing. The license number of a massage establishment must be listed in conjunction with the assumed or legal name of the massage establishment. An assumed name used by a massage therapist must not be false, misleading, or deceptive.

(d) A massage school shall not make false, misleading, or deceptive statements concerning the activities or programs of another massage school.

(e) A massage school shall not maintain, advertise, solicit for or conduct any course of instruction intended to qualify a person for licensure as a massage therapist without first obtaining licensure from the department.

(f) Advertisements by a massage therapy educational program seeking prospective students must clearly indicate that training is being offered, and shall not, either by actual statement, omission, or intimation, imply that prospective employees are being sought.

(g) Advertisements seeking prospective students must include the full and correct name and license number of the massage therapy educational program and massage school.

(h) No statement or representation shall be made to prospective or enrolled students that employment will be guaranteed upon completion of any program or that falsely represents opportunities for employment.

(i) No statement shall be made by a massage therapy educational program or a massage school that it has been accredited unless the accreditation is granted from a nationally recognized accrediting agency or organization. The name of the accrediting agency or organization must be used in any accreditation statement.

(j) No massage therapy educational program shall advertise as an employment agency under the same name or a confusingly similar name or at the same location as the educational program. No representative shall solicit students for a program through an employment agency.

(k) A massage therapy school shall not use endorsements, commendations, or recommendations by students in favor of a massage therapy educational program except with the consent of the student and without any offer of financial or other material compensation. Endorsements shall bear the legal or professional name of the student. An endorsement of a school by a student in compliance with this subsection is not a testimonial as referenced in subsection (b)(4) of this section.

§140.307. Massage Therapy Licenses.

(a) The department will send each applicant whose application for licensure has been approved a license containing a license number. Individual licensees will also be sent an identification card. Licenses and identification cards remain the property of the department and must be surrendered to the department on demand.

(b) A license must be displayed in an appropriate and public manner at the business location of the licensed business, or in the primary office or place of employment of the licensed individual. In the absence of a primary office or place of employment, the licensed individual shall carry a current identification card.

(c) Business licenses may not be sold or transferred to another address. If a licensed business is sold, or is closed at a particular address, the license certificate shall be returned to the department.

(d) Neither the licensee nor anyone else shall display a photocopy of a license or carry a photocopy of an identification card in lieu of the original document.

(e) Neither the licensee nor anyone else shall make any alteration on a license or identification card issued by the department.

(f) The department will replace a lost, damaged, or destroyed license or identification card upon written request from a licensee and payment of the appropriate replacement fee. The request shall include a statement detailing the loss or destruction of the original license or identification card, or be accompanied by the damaged license or card.

(g) Licenses and cards that were issued but may have not been received by a licensee may be replaced at no charge if the licensee notifies the department in writing and within 30 days of the date the license or card was issued.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on August 26, 2008.

TRD-200804644

Lisa Hernandez
General Counsel
Department of State Health Services
Earliest possible date of adoption: October 12, 2008
For further information, please call: (512) 458-7111 x6972

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DIVISION 3. MASSAGE THERAPISTS

25 TAC §§140.310 - 140.315

STATUTORY AUTHORITY

The proposed new rules are authorized by Occupations Code, §455.051, which authorizes the adoption of rules regarding massage therapists, massage therapy instructors, massage schools, and massage establishments; and Government Code, §531.0055, and Health and Safety Code, §1001.075, which authorize the Executive Commissioner of the Health and Human Services Commission to adopt rules and policies necessary for the operation and provision of health and human services by the department and for the administration of Health and Safety Code, Chapter 1001. Review of the rules implements Government Code, §2001.039.

The proposed new rules affect the Occupations Code, Chapter 455; Government Code, Chapters 531 and 2001; and Health and Safety Code, Chapter 1001.

§140.310. Qualifications for Licensure as a Massage Therapist.

(a) Each applicant for licensure as a massage therapist must be at least 18 years old and present evidence satisfactory to the department that the person:

(1) if first enrolled in a massage therapy training program prior to September 1, 2007, has successfully completed a 300-hour supervised course of instruction in massage studies provided by a licensed massage therapy instructor, licensed massage school, a state approved educational institution, or a combination of any of these. The 300-hour supervised course of instruction must include:

(A) 125 hours of Swedish massage therapy techniques;

(B) 50 hours of anatomy;

(C) 25 hours of physiology;

(D) 15 hours of hydrotherapy;

(E) 15 hours of business practices and professional ethics;

(F) 20 hours of health and hygiene; and

(G) a 50 hour internship;

(2) if first enrolled in a massage therapy training program on or after September 1, 2007, has successfully completed a minimum of a 500-hour supervised course of instruction in massage studies provided by a licensed massage school, a massage therapy instructor at a massage school, a state approved educational institution, or a combination of any of these. The 500-hour supervised course of instruction must include:

(A) 200 hours of massage therapy techniques and theory and the practice of manipulation of soft tissue, with at least 125 hours of Swedish massage therapy techniques;

(B) 50 hours of anatomy;

(C) 25 hours of physiology;

(D) 50 hours of kinesiology;

(E) 40 hours of pathology;

(F) 20 hours of hydrotherapy;

(G) 45 hours of massage therapy laws and rules, business practices and professional ethics;

(H) 20 hours of health, hygiene, first aid, universal precautions, and cardiopulmonary resuscitation (CPR); and

(I) a 50 hour internship; or

(3) has been licensed or registered in good standing as a massage therapist in another jurisdiction, including a foreign country, that has licensing or registration requirements substantially equivalent to those listed in paragraph (2) of this subsection.

(b) Applicants who began massage therapy studies prior to January 1, 1992, may be eligible for licensure by documenting completion of a 250-hour supervised course of instruction and are not required to have completed a 50-hour internship in accordance with subsection (a)(1) of this section.

(c) Degrees, certificates, diplomas, and course work received at other institutions, American or foreign, shall be accepted only if such institution is approved by an education agency in that state or country and the curriculum or course of studies meets the criteria set out by the Act and this subchapter. Course descriptions, school catalogs or bulletins may be required by the department to substantiate the curriculum.

(d) In the event that a deficiency is present in course work, the applicant may have up to one year to complete additional course work acceptable to the department; otherwise, the application may be voided.

§140.311. Massage Therapist Application Procedures and Documentation.

(a) Unless otherwise indicated, an applicant for licensure as a massage therapist must submit all required information and documentation of credentials on official department forms.

(b) The application fee must accompany the application form. The department will not consider an application as officially submitted until the applicant pays the application fee.

(c) If the application is incomplete, the department will send a notice listing any additional materials required to complete the application. An application not completed within 30 days after the date of the department's notice may be voided.

(d) Applicants must provide the following information on official department forms, unless otherwise requested by the department:

(1) specific information regarding personal data, social security number, birth date, place of employment, other state licenses and certifications held, misdemeanor and felony convictions, educational and training background, and work experience;

(2) a statement that the applicant has read the Act and this subchapter and agrees to abide by them;

(3) a statement that the applicant, if issued a license, shall return the license and identification cards to the department upon the expiration, revocation or suspension of the license;

(4) a statement that the applicant understands that fees and materials submitted in the licensure process are nonrefundable and nonreturnable;

(5) a statement that the information in the application is truthful and that the applicant understands that providing false and misleading information on items which are material in determining the ap-

plicant's qualifications may result in the voiding of the application and failure to be granted a license or the revocation of any licenses issued; and

(6) the applicant's signature.

(e) Applicants must submit official transcript(s) of all relevant course work. A copy of an official transcript that has been notarized as a true and exact copy of an original may be submitted in lieu of the official transcript.

§140.312. Provisional Massage Therapist License.

(a) The department may issue a provisional license to an applicant for licensure as a massage therapist or massage therapy instructor who is at least 18 years old and is currently licensed or registered in another jurisdiction and who:

(1) has been licensed or registered in good standing as a massage therapist or massage therapy instructor, as applicable, for at least two years in another jurisdiction, including a foreign country, that has licensing or registration requirements substantially equivalent to the requirements of the Act;

(2) has passed a national or other examination recognized by the department, relating to the practice of massage therapy, for licensure or registration as a massage therapist or massage therapy instructor; and

(3) is sponsored by a person licensed by the department under the Act with whom the provisional licensee will practice during the time the person holds a provisional license.

(b) The department may waive the sponsorship requirement of subsection (a)(3) of this section if the department determines that compliance would be a hardship to the applicant.

(c) A provisional license is valid until the date the department approves or denies the provisional licensee's application for licensure. The department shall issue a license, without examination, to a person submitting the documentation set out in subsection (a) of this section.

(d) The department must approve or deny a provisional licensee's application for licensure not later than the 180th day after the date the provisional license is issued. The department may extend the 180-day period if the results of an examination have not been received by the department before the end of that period.

§140.313. Examinations Required for Licensure as a Massage Therapist.

(a) All applicants must pass a massage therapy examination approved by the department prior to submitting an application for licensure unless applying under the transition language at subsection (d) of this section.

(b) Examination results must reflect that the applicant passed the examination within two years of the application for licensure unless the applicant is currently licensed in another state or jurisdiction and is applying under §140.310(a)(3) of this title (relating to Qualifications for Licensure as a Massage Therapist).

(c) A license will not be issued until the department receives confirmation deemed acceptable by the department of a passing examination score. This may include receipt of an electronic file containing examination scores.

(d) Transition. Until January 1, 2009, an applicant who completes a course meeting the requirements of §140.310(a)(1) of this title may submit a request to take the Texas state written examination provided the person complies with the requirements of this subsection.

(1) The department or its designee shall send an examination approval notice to each applicant who is eligible to sit for the written examination.

(2) Approved examination candidates must complete the examination registration process and submit the examination fee by the established deadlines. Forms which are received incomplete or late may cause the applicant to miss the examination deadline.

(3) The department shall void the application of any applicant who fails to schedule and take an examination within one year after the examination approval notice is mailed to the applicant. To be eligible for subsequent examination(s), the applicant will be required to file another application and meet requirements in effect at that time.

(4) The examination will be conducted in the English language. Exceptions will be made when English is not the native or first language of the applicant. The written exam may be taken in a person's native language if the person notifies the department at least 60 days in advance, so that the written test can be available. The applicant will be responsible for any fee or consideration to be paid to an acceptable interpreter and/or translator whose services are necessary for the examination.

(5) Applicants with disabilities must inform the department, in advance, of special accommodations requested for examination.

(6) Exam candidates must sign a statement agreeing to maintain the confidentiality of the exam.

(7) Examinations will be held on dates and in locations to be announced by the department.

(8) Examinations will be graded by the department or its designee. The department or its designee shall notify each examinee of the results of the examination within 30 calendar days of the date of the examination.

(9) A person who fails the written examination may retest by registering for another examination and paying another examination fee. The department will void the application of a person who fails to pass the written examination within one year of the initial approval for examination.

(10) No refunds will be made to examination candidates who fail to appear for an examination.

(e) Jurisprudence Examination. Effective January 1, 2009, all new applicants for licensure as a massage therapist must also pass the department's jurisprudence examination before a license will be issued.

§140.314. Massage Therapist License Renewal.

(a) When issued, an initial license is valid until the last day of the licensee's birth month in the following year, as determined by the department, and must be renewed on or before the expiration date. Renewal licenses will be issued for a two-year period and expire on the last day of the licensee's birth month. The expiration date is noted on each license.

(b) Each licensee is responsible for renewing the license before the expiration date and shall not be excused from paying late renewal fees. Failure to receive notification from the department prior to the expiration date of the license will not excuse failure to file for renewal or late renewal.

(c) At least 30 days prior to the expiration date, the department will send a notice to each licensee at the licensee's last known address according to the records of the department. The notice shall include the expiration date of the license and the amount of the renewal fee.

(d) The department may request specific information for renewal including the licensee's preferred mailing address, primary employment address and telephone number, category of employment, all names or titles under which the licensee engages in the practice of massage therapy, and a statement of all misdemeanor and felony convictions or offenses for which deferred adjudication was received or for which a plea of nolo contendere or guilty was entered.

(e) For all renewals, licensees shall report continuing education required for renewal in accordance with §140.320 of this title (relating to Hour Requirements for Continuing Education for Massage Therapists).

(f) A licensee may renew by mailing the renewal fee and required documentation to the department or by electronic methods on or before the expiration date. The postmark date or the date of electronic renewal shall be considered in determining whether any late fees apply.

(g) The department shall not renew a license until it receives the fee and required documentation for renewal or notice of electronic renewal.

(h) A person whose license has expired for 90 days or less may renew by paying a fee that is equal to one and one-half times the normally required renewal fee.

(i) A person whose license has expired for more than 90 days but less than one year may renew by paying a fee that is equal to two times the normally required renewal fee.

(j) A person whose license has expired for more than one year may not renew. The person may obtain a new license by complying with the then current requirements and procedures for obtaining a license, including the examination.

(k) A person who was licensed in this state, moved to another state, and is currently registered or licensed as a massage therapist and has been in the practice of massage therapy in the other state for the two years preceding the date of application may obtain a license without reexamination. The person must pay to the department a fee that is equal to two times the normally required renewal fee for licensure.

(l) A person whose license has expired may not engage in the activities of a massage therapist and may not hold himself or herself out as a massage therapist, imply that he or she has the title of " licensed massage therapist" or "massage therapist", or use "RMT", "LMT", or "MT" or any facsimile of those titles in any manner.

(m) The department shall deny renewal of the license of a licensee if renewal is prohibited by the Education Code, §57.491 (relating to Loan Default Ground for Non-renewal of Professional or Occupational License).

(n) The department shall not renew a license if renewal is prohibited by a court order or attorney general's order issued pursuant to the Family Code, Chapter 232 (relating to Suspension of License).

§140.315. Active Military Duty.

(a) If a licensed massage therapist fails to timely renew his or her license because the licensee is or was on active duty with the armed forces of the United States of America, the licensee may renew the license pursuant to this section.

(1) Renewal of the license may be requested by the licensee, the licensee's spouse, or an individual having power of attorney from the licensee. The renewal form shall include a current address and telephone number for the individual requesting the renewal.

(2) Renewal may be requested before or after expiration of the license.

(3) A copy of the official orders or other official military documentation showing that the licensee is or was on active duty shall be filed with the department along with the renewal form.

(4) A copy of the power of attorney from the licensee shall be filed with the department along with the renewal form if the individual having the power of attorney executes any of the documents required in this subsection.

(b) A licensee renewing under this section shall pay the applicable renewal fee, but not a late renewal fee.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on August 26, 2008.

TRD-200804645
Lisa Hernandez
General Counsel
Department of State Health Services
Earliest possible date of adoption: October 12, 2008
For further information, please call: (512) 458-7111 x6972

DIVISION 4. CONTINUING EDUCATION

25 TAC §§140.320 - 140.324

STATUTORY AUTHORITY

The proposed new rules are authorized by Occupations Code, §455.051, which authorizes the adoption of rules regarding massage therapists, massage therapy instructors, massage schools, and massage establishments; and Government Code, §531.0055, and Health and Safety Code, §1001.075, which authorize the Executive Commissioner of the Health and Human Services Commission to adopt rules and policies necessary for the operation and provision of health and human services by the department and for the administration of Health and Safety Code, Chapter 1001. Review of the rules implements Government Code, §2001.039.

The proposed new rules affect the Occupations Code, Chapter 455; Government Code, Chapters 531 and 2001; and Health and Safety Code, Chapter 1001.

§140.320. Hour Requirements for Continuing Education for Massage Therapists.

(a) Licensees must successfully complete at least 12 hours of acceptable continuing education to renew a two-year license.

(b) One hour of credit will be awarded for each clock hour of attendance at acceptable continuing education activities, except as follows:

(1) one semester hour of academic credit will constitute fifteen clock hours of continuing education;

(2) one quarter hour of academic credit will constitute ten clock hours of continuing education; and

(3) 0.1 continuing education unit will constitute one clock hour of continuing education.

(c) A clock hour is equal to 50 minutes.

§140.321. Acceptable Continuing Education for Massage Therapists.

(a) Acceptable continuing education includes attendance at and completion of department approved or recognized programs (other than the minimum 500 hour course of instruction required for licensure), institutes, seminars, workshops, state or national conferences, advanced course work, or college and university academic courses that are:

(1) directly related to the theory or clinical application of theory pertaining to the practice of massage therapy and the manipulation of soft tissue, massage therapy laws and rules, business practices, professional ethics, anatomy, physiology, hydrotherapy, kinesiology, pathology, or health and hygiene; or

(2) first aid and/or CPR, not to exceed six hours total each renewal period; or

(3) advanced massage therapy or bodywork techniques acceptable to the department; and

(4) designed to increase and enhance professional knowledge, skills, or competence in the practice of massage therapy.

(b) Continuing education approved or recognized by the department must be developed and presented by qualified persons.

(1) Massage therapy techniques and courses involving the manipulation of soft tissue must be taught or presented by a licensed massage therapy instructor. Advanced massage therapy or bodywork techniques must be taught or presented by persons with licensure, registration, or education in the technique being presented.

(2) Courses, other than techniques, may be taught or presented by persons with licensure, registration, education or practical experience in the subject being presented. Instructors teaching CPR must be certified as CPR instructors by the American Heart Association, the American Red Cross, or the National Safety Council, or another provider with curriculum that is in compliance with nationally accepted guidelines established by the American Red Cross, the American Heart Association, or the National Safety Council. Instructors teaching First Aid must be certified as First Aid instructors by the American Red Cross, the American Heart Association, the National Safety Council, or another provider with curriculum that is in compliance with nationally accepted guidelines established by the American Red Cross, the American Heart Association, or the National Safety Council.

(3) Out-of-state instructors or presenters offering continuing education in Texas on massage therapy techniques or involving the manipulation of soft tissue must be in compliance with any licensure, registration or certification requirements for massage therapists and massage therapy instructors in the instructor or presenter's home state or be licensed to practice medicine, occupational therapy, chiropractic, athletic training, physical therapy, or nursing. If the instructor or presenter's home state does not have licensure, registration or certification requirements for massage therapists and massage therapy instructors, the instructor or presenter must provide documentation of education or practical experience specific to the continuing education being offered.

(c) Continuing education which otherwise meets the standards of this section but is offered or presented online or by correspondence is acceptable only if the subject matter is not massage therapy techniques or manipulation of soft tissue.

(d) Continuing education completed out-of-state may be accepted by the department if it is approved by the National Certification Board for Therapeutic Massage and Bodywork. Additional information regarding the continuing education may be required for departmental review.

§140.322. Activities Unacceptable as Continuing Education for Massage Therapists.

The department shall not give continuing education credit for:

(1) education incidental to the regular professional activities of a massage therapist, such as learning occurring from experience or research;

(2) professional organizational activity, such as serving on committees or councils or as an officer in a professional organization;

(3) college academic courses which are audited or not taken for credit;

(4) independent study except online or correspondence courses in accordance with §140.321(c) of this title (relating to Acceptable Continuing Education for Massage Therapists); or

(5) any experience which does not fit the types of acceptable continuing education in this section.

§140.323. Pre-approved Continuing Education Providers.

(a) Continuing education providers may apply for provider pre-approval on department forms. Approval of provider applications will be determined by review of the application and determination of applicants' ability to comply with department rules. Approved applications are effective for two years from the date of approval.

(b) Pre-approved providers of continuing education must comply with department requirements set out in §140.320 of this title (relating to Hour Requirements for Continuing Education for Massage Therapists) and §141.321 of this title (relating to Acceptable Continuing Education for Massage Therapists).

(c) Effective June 1, 2009, each pre-approved provider of continuing education must pass the written jurisprudence examination administered by the department prior to initial approval.

(d) Pre-approved providers of continuing education must maintain attendance records of all continuing education activities for a period of three years.

(e) Pre-approved providers shall issue a certificate of attendance to each participant in a program. The certificate of attendance shall contain:

(1) the name of the pre-approved provider and approval number;

(2) the name of the participant;

(3) the title of the program;

(4) the number of credit hours given;

(5) the subject(s) included in the program;

(6) the date and place of the program; and

(7) the signature of the pre-approved provider.

(f) Continuing education providers must renew the approval prior to the expiration date. Renewed approvals will be issued for a two-year period as determined by the department.

(g) The department may audit pre-approved providers for compliance with this section.

§140.324. Reporting Continuing Education.

(a) The department will monitor a licensee's compliance with continuing education requirements by the use of a random audit system. Supporting documentation of participation in continuing education activities need not be submitted at the time of license renewal unless a

written audit notice is received informing the licensee that he or she has been selected for a document audit.

(b) Continuing education supporting documentation includes:

(1) certificates of attendance or completion;

(2) transcripts of academic work or approved course work; or

(3) any other documentation acceptable to the department.

(c) Licensees who receive an audit form with the renewal notice or at any other time shall submit all appropriate documentation to substantiate compliance with the department's continuing education requirements.

(d) Licensees are responsible for maintaining continuing education records for a period of three years.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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Lisa Hernandez
General Counsel
Department of State Health Services
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For further information, please call: (512) 458-7111 x6972

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DIVISION 5. MASSAGE SCHOOLS AND MASSAGE THERAPY INSTRUCTORS

25 TAC §§140.330 - 140.351

STATUTORY AUTHORITY

The proposed new rules are authorized by Occupations Code, §455.051, which authorizes the adoption of rules regarding massage therapists, massage therapy instructors, massage schools, and massage establishments; and Government Code, §531.0055, and Health and Safety Code, §1001.075, which authorize the Executive Commissioner of the Health and Human Services Commission to adopt rules and policies necessary for the operation and provision of health and human services by the department and for the administration of Health and Safety Code, Chapter 1001. Review of the rules implements Government Code, §2001.039.

The proposed new rules affect the Occupations Code, Chapter 455; Government Code, Chapters 531 and 2001; and Health and Safety Code, Chapter 1001.

§140.330. Massage School General Provisions and Inspections.

(a) Unless exempt, a person or entity who provides at a minimum the course of instruction required for licensure to one or more students constitutes a massage therapy educational program and must obtain licensure as a massage school.

(b) Minimum standards of operation must be maintained by all massage therapy educational programs to ensure educational programs of high quality which will be of benefit to the student, the school, and the public.

(c) If a massage school suspends enrollments or closes, the program shall not advertise, solicit, or in any way advise prospective students, either directly or indirectly, of the program offerings. If a massage school suspends or closes, it must give written notice to the department within 10 days of the suspension or closure. The department shall be furnished with the names and addresses of any students who were prevented from completion by reason of the discontinuance of the program.

(d) All massage therapy educational programs shall notify the department in writing of any legal action (civil or criminal) which may concern the operation of the educational program and which is filed against the educational program, its officers, directors, or any employee within ten working days after the educational program, its officers, directors, or any employee has commenced the legal action or been served with legal process. The educational program shall submit a file-marked copy of the petition or complaint that has been filed with the court with the written notice.

(e) There will be at least one unannounced inspection at the primary instructional location of each massage therapy educational program and at each additional location every two years.

(1) Other inspections may be performed, announced or unannounced, at the discretion of the department.

(2) If deficiencies are found, the massage therapy educational program shall be notified at the end of the inspection of the deficiencies. If deficiencies are not serious or do not raise health and safety concerns, the department shall give the educational program 30 days to correct the deficiencies.

§140.331. Massage School Application Procedures and Documentation.

(a) An application shall be submitted to the department at least 60 days prior to the proposed starting date of the massage therapy educational program. An application must be submitted on official department forms and signed by the owner or authorized representative of the massage therapy educational program.

(b) No educational program shall be operated or instruction given and no student shall be solicited or enrolled until the department has conducted an inspection and approved the application.

(c) An original of the entire application and supporting documentation must be submitted with all pages clearly legible. Applications which are received incomplete may cause postponement of the educational program's starting date.

(d) The department shall conduct an inspection of an instructional site prior to an educational program beginning operation. No educational program may be operated or instruction given at any location which has not been approved by the department.

(e) The license must be displayed in an appropriate and public manner at the location of the educational program.

(f) The effective date of the license shall be the date the license is issued.

§140.332. Massage School Administrative Personnel.

(a) Each massage therapy educational program shall notify the department of the name of the person designated as the director of the educational program. The director is responsible for the educational program, the organization of classes, the maintenance of the physical location and the instructional site(s), the maintenance of proper administrative records and all other procedures related to the administration of the educational program.

(b) The director shall designate an individual to perform all the functions of, and succeed to, the authority of the named director when

the director is unavailable or absent from the educational program. The director shall notify the department of the name of the designated individual.

(c) The director or his or her designee must be available during scheduled inspections by the department.

§140.333. Massage School Instructors.

(a) A licensed massage therapy instructor shall instruct the 125 hours of Swedish massage therapy, any other instruction in massage techniques or manipulation of soft tissue, and the internship portion of the required course of instruction.

(b) To qualify for licensure as a massage therapy instructor, a person shall:

(1) be a licensed massage therapist;

(2) have a high school diploma, a general equivalence diploma or a transcript from an accredited college or university showing successful completion of at least 12 semester hours;

(3) submit a statement of assurance that the licensee has been engaged in the practice of massage therapy for at least one-year and has conducted 500 hours of hands-on experience (does not include internship hours). Hours accumulated while holding a provisional license can be applied to the requirements of this paragraph; and

(4) complete a 30-hour course on teaching adult learners. Courses attended may include an instructional certification program, a college level course in teaching adult learners, a continuing education course in teaching adult learners, or an advanced program approved by the department in teaching the course of instruction.

(c) Persons qualified to instruct courses other than massage therapy technique or manipulation of soft tissue courses are not required to hold a massage therapy instructor license. These persons must hold:

(1) a baccalaureate or higher degree from an accredited college or university that includes:

(A) satisfactory completion of nine semester hours or 12 quarter hours in subjects related to the subject area to be taught; or

(B) have a minimum of one year of practical experience within the last ten years in the subject area to be taught;

(2) an associate degree from an accredited college, university, or recognized post-secondary institution and must have:

(A) a minimum of one year of practical experience within the last ten years in the subject area to be taught and the associate degree must include satisfactory completion of nine semester hours or 12 quarter credit hours in subjects related to the subject area to be taught; or

(B) a minimum of two years of practical experience within the last 10 years in the subject area to be taught; or

(3) a high school diploma, general equivalency degree (GED), or proof of satisfactory completion of relevant subject(s) from a recognized post-secondary institution and practical experience of a minimum of two years within the last ten years in the subject area to be taught.

(d) Instructors teaching CPR must be certified as CPR instructors by the American Heart Association, the American Red Cross, or the National Safety Council, or another provider with curriculum that is in compliance with nationally accepted guidelines established by the American Red Cross, the American Heart Association, or the National Safety Council.

(e) Instructors teaching First Aid must be certified as First Aid instructors by the American Red Cross, the American Heart Association, the National Safety Council, or another provider with curriculum that is in compliance with nationally accepted guidelines established by the American Red Cross, the American Heart Association, or the National Safety Council.

(f) Each instructor employed by a licensed massage school shall be evaluated by the school annually. A report of the evaluation shall be available for review by the department.

(g) Licensed massage schools shall ensure continuity of instruction through the reasonable retention of qualified instructors.

§140.334. Massage School Financial Stability.

(a) Applicants for initial licensure of a massage school shall furnish the department with complete and correct financial statements or documents, sufficient to demonstrate the massage therapy educational program is financially stable and capable of fulfilling its commitments for training.

(1) Applicants must submit the following:

(A) for a school owned by a sole proprietor, a personal balance sheet reviewed by a certified public accountant or public accountant registered with the State Board of Public Accountancy with notes that disclose the amount of payments for the first five years of operation to meet debt agreements as required by generally accepted accounting principles (GAAP); or

(B) for all other ownership structures, a balance sheet consistent with GAAP and generally accepted auditing standards (GAAS) that has been audited and certified by a certified public accountant or public accountant.

(2) Additional documents required for initial licensure include:

(A) a list of the expected operation-related expenses for the first three months of operation of the educational program;

(B) a sworn statement signed by the prospective owner affirming the availability of sufficient cash to cover projected expenses, which may include:

(i) total salaries, including withholding, unemployment taxes, and any other related expenses or benefits;

(ii) lease payments for equipment listed by the name of the equipment;

(iii) lease payments for facilities;

(iv) accounting, legal, and other specifically identified professional fees;

(v) an estimate of other expenses such as advertising, travel, textbooks, office supplies, classroom supplies, printing, telephone, utilities, taxes, and sales commissions; and

(C) other evidence as may be deemed appropriate by the department to establish financial stability.

(b) All financial documents must identify the name of the certified public accountant or public accountant preparing the documents and be in accordance with GAAP.

(c) A corporate applicant must file a statement from the Comptroller of Public Accounts that its franchise taxes are current, that the corporation is exempt from payment of the franchise tax, or that it is an out-of-state corporation that is not subject to the franchise tax.

(d) A massage therapy educational program that participates in federal financial aid programs must submit a copy to the department of each audit completed in accordance with reporting requirements of "Government Auditing Standards", the most current edition, issued by the Comptroller General of the United States, at the same time the audit report is submitted to the United States Department of Education.

(e) Financial statements for the most recent fiscal year are required at the time of renewal in accordance with §140.314 of this title (relating to Massage Therapist License Renewal).

§140.335. Change of Massage School Ownership.

(a) The license of a massage school may not be sold or transferred to another person or owner.

(b) The department may consider the addition or deletion of any person defined as an owner in §140.300(17) of this title (relating to Definitions) as a change in ownership. The massage school must notify the department of the change in ownership a minimum of 60 days before the change in ownership to request that the department, in lieu of a full application, accept a partial application. All fees for initial application will apply.

(c) The department may require submission of a complete application for licensure if:

(1) the department has a reasonable basis to believe the change in ownership of the school may significantly affect the massage therapy educational program's continued ability to meet the criteria for approval; or

(2) the educational program fails to file notice of the change of ownership at least 60 days prior to the ownership transfer.

(d) The department may require a partial application for licensure if the department reasonably believes the change in ownership will not significantly affect the educational program's continued ability to meet the criteria for approval.

(e) Prior to a change in ownership of a massage school, the purchaser shall furnish the department a balance sheet meeting the requirements for initial licensure outlined in §140.334(a) of this title (relating to Massage School Financial Stability), excluding the sufficient cash requirement for initial expenses. The purchaser shall furnish any other evidence deemed appropriate by the department to establish financial stability.

(f) The purchaser of a massage school shall accept responsibility for all refund liabilities.

(g) The department may issue a new license, resulting from a change of ownership, without conducting an inspection if an inspection of the facility has been conducted within the previous year and if the new owner verifies that no changes will be made to existing facilities.

§140.336. Massage School License Renewal.

(a) When issued, the license of a massage school is valid for a two-year period beginning on the date of issuance of the initial license. A licensee must renew the license prior to the expiration of the license.

(b) The expiration date of a license shall be the last day of the month in which the license was originally issued.

(c) A complete application for renewal of a license shall consist of:

(1) the renewal fee;

(2) the completed application for renewal;

(3) the complete annual financial statements for the most recent fiscal year, demonstrating the massage therapy educational program is financially stable and capable of fulfilling its commitments for instruction; and

(4) any other information deemed necessary by the department to determine compliance with the Act and this subchapter.

(d) At least 30 days prior to the license expiration date, the department shall send a notice of the expiration date and the amount of the renewal fee due. The notice will be mailed to the address in the department's records. Each massage school must complete and return the license renewal form to the department with the required renewal fee.

(e) The renewal forms for massage schools shall require the address, the names of the owner/operator of the school, a statement of all misdemeanor and felony offenses for which the licensee or owner or operator have been convicted, entered a plea of nolo contendere or guilty, or received deferred adjudication.

(f) A massage school has renewed the license when it has mailed the renewal form and the required renewal fee to the department prior to the expiration date of the license. The postmark date shall be considered the date of mailing. Massage schools should allow three to four weeks for the department to receive the license renewal fees and documentation, and print the certificate.

(g) The department shall issue a renewal license to a massage school once all requirements for renewal are met.

(h) A massage school whose license has been expired for 90 days or less may renew by submitting all required documentation and paying a fee that is equal to one and one-half times the normally required renewal fee.

(i) A massage school whose license has been expired for more than 90 days but less than one year may renew by submitting all required documentation and paying a fee that is equal to two times the normally required renewal fee.

(j) A massage school which operates a massage therapy educational program with an expired license may be subject to disciplinary action. Course hours taught during the time the license is expired will not apply toward the minimum 500-hour course of instruction. For the purpose of establishing the date of late renewal, the postmark date shall be considered the date of mailing.

(k) A massage school may not renew a license that has been expired for more than one year.

§140.337. Massage School Locations.

(a) A license shall be issued for each approved instructional location(s). Instruction shall not be provided at an additional location until the department has issued a license for the additional location.

(b) A massage school shall obtain approval for any additional location(s) where the massage therapy educational program will be offered. All policies and curriculum of the original location apply to an additional location(s).

(c) A request for licensure of an additional location shall include the appropriate fee and the following documents:

(1) fire inspection report, if required by the city or county;

(2) certificate of occupancy;

(3) lease agreement;

(4) detailed floor plan; and

(5) inventory.

(d) The department may approve a massage therapy educational program to begin operation at an additional location prior to inspection if an inspection of the location has been conducted by the department within the preceding 90 days or if the instruction will be conducted at a public facility, such as a hotel, hospital, university, college, etc.

(e) A request for a change of instructional location of a massage therapy educational program must be filed and approved by the department before the new location is used. Upon approval of a change of instructional location, no course work may be provided at the previous location.

(f) Any refunds due under the cancellation and refund policy must be made before the department will approve an additional location or a change of location.

(g) The department may issue an emergency approval for a change of instructional location or additional location on the basis of documented circumstances beyond the massage therapy educational program's control (e.g., fire, flood, breach of lease, etc.).

(1) All required documents must be submitted before the emergency approval will be considered.

(2) All required fees for the change of location or approval of additional location must be submitted to the department within 10 days of issuance of the emergency approval unless the new location is only used once.

§140.338. Massage School Curriculum Outline and Internship.

(a) Each massage therapy educational program shall follow the curriculum outline prescribed by the department for the minimum 500-hour supervised course of instruction.

(b) A student must successfully complete the first 250 hours of the supervised course of instruction, including the successful completion of at least 100 hours of massage therapy techniques and theory, before the student is eligible to enter the internship program.

(c) A classroom hour shall include at least 50 clock minutes of actual classroom time and may include a maximum of 10 minutes of break time. Break time for hours which are taught consecutively in one sitting (i.e., in one evening) may be aggregated into a single break time during those consecutive hours, not to exceed 3 hour blocks of instruction, but not at the end of those hours. The 10 minutes of break time may not be accumulated and used in lieu of lunch or dinner breaks.

(d) An instructor must be physically present with the student(s) during the classroom hours taught by that instructor, including make-up work.

(e) An internship program must provide a student with a minimum of 40 hours of hands-on massage therapy experience at the location of the student's enrollment. A student enrolled at an additional location shall not be required to travel to another location to complete the internship.

(f) During the hands-on experience, a massage therapy instructor must be available on the premises of the educational program and be immediately available to the student(s).

(g) A massage therapy educational program shall not require a student to advertise for clients or to obtain clients as part of the internship program. At the student's option and with the educational program's permission, a student may obtain clients for the student's hands-on massage therapy experience.

(h) A massage therapy educational program must provide all of the minimum 500 hours of the supervised course of instruction at the site where the student enrolled, unless otherwise agreed to by both the student and the massage therapy educational program.

(i) A massage therapy educational program shall schedule classes and internship clients so that the students will be able to complete the program during the length of time stipulated in the pre-enrollment information. No evening class may be scheduled to extend beyond a reasonable time.

(j) Approved internship programs may not exceed 120 hours. Individuals who have completed the required minimum 500-hour supervised course of instruction, including the 50-hour internship, are eligible for examination and licensure. For the purposes of Texas Occupations Code, §455.053(7), 50 hours is the maximum number of hours a student can accumulate in an internship before the student is required to be licensed unless the student is enrolled in a massage therapy educational program with an internship of up to 120 hours which has been approved by the department in accordance with subsection (m) of this section. No student may complete more than one internship program.

(k) A massage school shall not allow an unlicensed student to receive any form of compensation for massage therapy or other massage therapy services.

(l) A massage school shall not allow, authorize, or contract with an unlicensed student enrolled in any course or portion of a course offered by the school to provide massage therapy or other massage therapy services to the public for compensation in excess of the internship approved by the department.

(m) A massage school shall request and receive approval to offer a course of instruction designed as a massage therapy educational program which exceeds the 500-hour minimum required for licensure and is otherwise conducted in accordance with all rules pertaining to a massage therapy educational program. A massage school shall not offer a massage therapy educational program which exceeds the 500-hour minimum required for licensure without receiving approval in writing from the department. Such approval shall only be granted by the department if:

(1) the massage therapy educational program or massage school is accredited by an accrediting body approved by the US Department of Education; or

(2) the massage therapy educational program is approved by the department and meets the following requirements:

(A) the massage therapy school also offers the 500-hour minimum course of instruction required for licensure concurrently and the student is allowed to choose whether or not to enroll in a program that exceeds the minimum number of hours required for licensure;

(B) the massage therapy educational program shall follow the curriculum outline prescribed by the department for the minimum 500 hour supervised course of instruction;

(C) all classroom hours in excess of 450 hours are structured to achieve specific educational goals approved by the department which are directly related to one or more of the competencies included in the curriculum approved by the department;

(D) all internship hours in excess of 50 hours are structured to achieve specific educational goals approved by the department which are directly related to the clinical application of theory pertaining to the practice of massage therapy and the manipulation of soft tissue;

(E) the total number of classroom hours does not exceed 880 hours;

(F) the total number of internship hours does not exceed 120 hours;

(G) the massage therapy school:

(i) provides the student with a department form designed to inform the student that the massage therapy educational program exceeds the minimum number of hours required by law for licensure;

(ii) obtains the student's signature on the form prior to enrollment;

(iii) provides a copy of the signed form to the student; and

(iv) maintains a copy of the signed form in the student's file.

(H) Failure to comply with this subchapter shall constitute grounds for the department to deny or withdraw approval of programs or to take disciplinary action against a massage school.

§140.339. Advanced Course Work.

(a) Advanced course work offered by a massage school which is beyond and not a part of the minimum 500 hour course of instruction must be:

(1) directly related to the theory or clinical application of theory pertaining to the practice of massage therapy and the manipulation of soft tissue, business practices, professional ethics, massage therapy laws and rules, universal precautions, anatomy, physiology, kinesiology, pathology, hydrotherapy, and health and hygiene; and

(2) designed to increase and enhance professional knowledge, skills, or competence in the practice of massage therapy or other massage therapy services.

(b) A massage school shall not offer advanced course work which authorizes the practice of diagnosis, the treatment of illness or disease, or any service or procedure for which a license to practice medicine, chiropractic, physical therapy or podiatry is required by law.

(c) Massage schools shall maintain academic transcripts of advanced course work permanently and shall retain all other student records for at least three years from the last date attended for students of advanced course work. Financial records will be retained as required by federal retention requirements, if applicable.

(d) A massage school may not represent that advanced course work is approved by the department.

(e) Unlicensed students enrolled in advanced coursework may not provide massage therapy or other massage therapy services to the public.

§140.340. Massage School Admission Requirements.

(a) Each massage therapy educational program shall submit a copy of its admission requirements for the department's approval or disapproval. Justification shall be submitted for each of the admission requirements.

(b) Evidence shall be maintained in each student's file to show that the admission requirements have been met.

(c) Each massage therapy educational program must maintain a written record of the previous education and training of a student which meets any portion of the course of instruction required for licensure. The record shall include, if applicable, proof of current CPR and/or First Aid certification from the American Heart Association, American Red Cross, or National Safety Council, or another provider with curriculum that is in compliance with nationally accepted guidelines established by the American Red Cross, the American Heart Association, or the National Safety Council for a maximum of six hours of credit. Official transcripts and documentation of course work obtained at colleges, universities, or out of state institutions must be placed in the student's file along with a copy of the department's written evaluation.

(d) A massage therapy educational program may not require a student to take subjects the student has already successfully completed and which meet the requirements for licensure.

§140.341. Massage School Enrollment Procedures.

(a) Prior to enrollment, each massage therapy educational program shall provide each prospective student copies of the following:

(1) a program outline;

(2) the admission requirements;

(3) a schedule of tuition, fees, and other charges;

(4) a cancellation and refund policy;

(5) the length of time for completion of program, including internship hours;

(6) a class schedule including estimated break and meal times;

(7) the attendance and progress policies, including requirements and fees for make-up hours;

(8) grievance policies;

(9) the pupil-teacher ratio;

(10) the conduct policy;

(11) the written and verbal explanations of the difference between a loan and a grant, if the school participates in a loan or grant program;

(12) a copy of the enrollment agreement;

(13) a notice that clearly states the number of course hours which must be successfully completed before a student can be licensed as a massage therapist under this subchapter;

(14) a list of instructors, their qualifications, and the subject area taught by each;

(15) information indicating how a prospective student may obtain copies of the Massage Therapy Act, Texas Occupations Code, Chapter 455 and this subchapter; and

(16) a statement that the Act sets out that a person is ineligible for licensure:

(A) if the person has been convicted of, entered a plea of nolo contendere or guilty to, or received deferred adjudication to crimes or offenses involving prostitution or another sexual offense;

(B) until the fifth anniversary of the date of a conviction for a misdemeanor involving moral turpitude or a felony; or

(C) until the fifth anniversary of the date of a conviction of a violation of the Act.

(b) Each prospective student shall be given a reasonable time to review the material in subsection (a) of this section and offered the opportunity to tour the instructional facility and inspect equipment prior to signing an enrollment agreement. The prospective student may decline the tour.

(c) Each massage therapy educational program shall use an acknowledgment form approved by the department to verify the prospective student's receipt of the information required in subsection (a) of this section. A signed copy of the form shall be given to the prospec-

tive student and the original shall be maintained in the student's file. The form shall include the following or similar statements.

(1) "I have been furnished information disclosing my previous education, training, and work experiences. I understand this will be evaluated and may result in the program length being shortened and the cost reduced."

(2) "I further realize that complaints may be made to the massage therapy educational program and the Department of State Health Services, Massage Therapy Licensing Program, P.O. Box 149347, Austin, Texas 78714-9347, (512) 834-6616."

(3) "I have been offered the opportunity to read the Massage Therapy Act and the rules of the department included in 25 Texas Administrative Code Chapter 140."

(4) "I have been made aware that the State of Texas requires only the minimum 500 hour course of instruction for licensure as a massage therapist, and anything beyond that is strictly voluntary".

(d) Each massage therapy educational program shall develop an enrollment agreement which shall be used to enroll each student. The agreement shall include but is not limited to:

(1) the full and correct name and location of the massage school, massage therapy educational program, and the massage school director(s) and owner(s);

(2) the program title, tuition, fees, reasonable estimated cost of books and supplies, any other expenses, total cost of the program, items subject to cost change, method of payment and payment schedule, disclosure statement (if interest is charged on more than three payments), student's right to cancel;

(3) the number of classroom and internship hours included in the program;

(4) the date the program is to begin, the course length and course schedule;

(5) the name and address of the student; and

(6) a statement that the student has received a copy of the information in subsection (a) of this section.

(e) Each student shall be given a copy of his or her executed enrollment agreement and a copy shall be kept in the student's file maintained by the school along with a copy of the acknowledgment form required by subsection (c) of this section.

§140.342. Massage School Tuition and Fees.

(a) A massage therapy educational program shall develop and implement a written policy relating to method(s) of payment available to enrolling students. If student financing is available through any form of arrangement or agreement between the educational program and a lending institution, the complete terms of the arrangement or agreement must be disclosed in the policy. In addition, if any form of financing is available at or through the educational program, all charges, the true annual percentage rate and the name(s) and address(es) of the lending institution(s) shall be disclosed in the policy.

(b) A student shall not be held liable for any tuition, fees, or other charges not disclosed in the policy at the time of enrollment.

(c) Scholarships may be offered, provided the terms of the scholarships are published and disclosed in the policy.

(d) Any funds received from, or on behalf of, a student shall be recorded in a format that is current and readily accessible to department representatives. Receipts shall be issued to the student. The funding source and the reason for the charges shall be clearly identified on both the school's record and the receipt.

(e) A massage school may not allow a student to engage in the unlicensed practice of massage in order to pay for tuition, fees, or other charges associated with the student's massage therapy education.

§140.343. Massage School Conduct Policy.

A massage therapy educational program shall develop and implement a written policy pertaining to the conduct of students. The policy shall include:

(1) conditions for dismissal; and

(2) conditions for re-entrance of those students dismissed for violating the conduct policy.

§140.344. Massage School Cancellation and Refund Policy.

(a) Each massage therapy educational program shall develop and implement a cancellation and refund policy which must provide a full refund of all monies paid by a student if:

(1) the student cancels the enrollment agreement within 72 hours (until midnight of the third day excluding Saturdays, Sundays, and legal holidays) after the enrollment contract is signed by the prospective student;

(2) the enrollment of the student was procured as the result of any misrepresentation in advertising, in promotional materials of the massage therapy educational program or by the owner, the massage school, or massage therapy instructor; or

(3) the student was not provided ample opportunity to read the information provided in §140.341(a) of this title (relating to Massage School Enrollment Procedures).

(b) The policy must provide for the refund of the unused portion of tuition, fees, and other charges in the event the student, after expiration of the 72-hour cancellation privilege, fails to enter, withdraws from, or is terminated from the program at any time prior to completion. The policy must provide that:

(1) refunds for each program will be based on the program time expressed in clock hours;

(2) refunds must be consummated within 30 days after the earliest of:

(A) the effective date of termination if the student is terminated;

(B) the date of receipt of written notice from the student of withdrawal; or

(C) 10 instructional days following the first day of the program if the student fails to enter;

(3) if tuition is collected in advance of the first day of the program, and if, after expiration of the 72-hour cancellation privilege, the student does not enter the program, not more than $200 shall be retained by the massage therapy educational program;

(4) if a student enters a massage therapy educational program and is terminated or withdraws, the minimum refund of the tuition will be:

(A) during the first week or one-tenth of the program, whichever is less, 90% of the remaining tuition;

(B) after the first week or one-tenth of the program, whichever is less, but within the first three weeks of the program, 80% of the remaining tuition;

(C) after the first three weeks of the program, but within the first quarter of the program, 75% of the remaining tuition;

(D) during the second quarter of the program, 50% of the remaining tuition;

(E) during the third quarter of the program, 10% of the remaining tuition; and

(F) during the last quarter of the program, the student may be considered obligated for the full tuition;

(5) refunds of items of extra expense to the student, such as instructional supplies, books, student activities, laboratory fees, service charges, rentals, deposits, and all other such ancillary miscellaneous charges, where these items are separately stated and shown in the pre-enrollment information, will be made in a reasonable manner;

(6) if a program is discontinued by the massage school and this prevents the student from completing the program:

(A) all tuition and fees paid shall be refunded if the student is not provided with a transcript of all successfully completed hours within 30 days of discontinuance of the program; or

(B) in the event an additional or changed location is 10 miles or more from the previously approved location of instruction and an enrolled student is unable to complete the program at the additional or changed location as determined by the department:

(i) all tuition and fees paid shall be refunded if the student is not provided with a transcript of all successfully completed hours within 30 days of the change of location; or

(ii) all unearned tuition and fees shall be refunded if a transcript of all successfully completed hours is provided within 30 days of the change of location.

(7) If a student did not meet the admission requirements of a program and the student does not complete the program for any reason, all tuition and fees shall be refunded.

(c) In all refund computations, leaves of absence, suspensions, school holidays, days when classes are not offered, and summer vacations shall not be counted as part of the elapsed time for purposes of calculating a student's refund.

(d) A massage therapy educational program is considered to have made a good faith effort to consummate a refund if the student's file contains evidence of the following attempts:

(1) certified mail to student's last known address;

(2) certified mail to the student's permanent address; and

(3) certified mail to the address of the student's parent, if different from the permanent address and if known.

(e) If the department determines that the method used to calculate refunds is not in compliance with this section and if the massage therapy educational program does not provide the correct refund promptly, the educational program shall submit a report of an audit conducted by a certified public accountant or public accountant of the refunds due former students. The audit report shall be accompanied by a schedule of student refunds due which shall disclose the following information for the previous four years for each former student:

(1) the name, address(es), and social security number;

(2) the last date of attendance and date of termination;

(3) the amount of refund with principal and interest separately stated, date and check number of payment if payment has been made, and any balance due; and

(4) the reason for refund.

(f) The department may take disciplinary action against the license of a massage school for a violation of this section; however, the department has no authority to recover a refund on behalf of a student.

§140.345. Massage School Minimum Progress Standards.

(a) Appropriate standards must be implemented to ascertain the progress of the students enrolled. Each massage therapy educational program shall have a progress evaluation system of a type and nature to reflect whether the student is making satisfactory progress to the point of being able to complete all subjects within the allotted time provided in the pre-enrollment information.

(b) The progress evaluation system shall be based on grading periods. A grading period shall not cover more than 25% of the required program hours.

(c) A student who is making unsatisfactory progress at the end of a grading period shall be placed on probation for the next grading period. If the student on probation achieves satisfactory progress for the subsequent grading period but has not achieved the required grades for overall satisfactory progress, the student may be continued on probation for one more grading period.

(d) When a student is placed on probation, that student will be counseled prior to returning to class, and the date, action taken, and terms of the probation shall be clearly indicated on the appropriate permanent records.

(e) If the student on probation fails to achieve satisfactory progress for the first probationary grading period, the student's enrollment may be terminated.

(f) The enrollment of a student who fails to achieve overall satisfactory progress for the program at the end of two successive probationary grading periods shall be terminated.

(g) A student whose enrollment was terminated for unsatisfactory progress may reenter after a minimum of one grading period.

(h) Refunds shall be made in accordance with §140.344 of this title (relating to Massage School Cancellation and Refund Policy). The effective date of termination for purposes of refunds shall be the last day of the last probationary grading period.

(i) A student who returns after the enrollment was terminated for unsatisfactory progress shall be placed on probation for the next grading period. The student shall be advised of this action and the student's file documented accordingly. If the student does not maintain satisfactory progress during or by the end of this probationary period, the student will be terminated.

§140.346. Massage School Attendance Standards.

(a) Each massage school shall develop and implement a written policy relating to attendance for students enrolled in a massage therapy educational program or any portion of the course of instruction.

(b) The policy shall include requirements and fees for make-up work.

(c) An absence shall be charged for a full day when a student attends none of the scheduled classes on that day. A partial day of absence shall be charged for any period of absence during the day.

(d) School holidays shall not be considered as days of absence.

(e) The attendance policy shall require the termination of students who accumulate absences of:

(1) more than 10 consecutive school days; or

(2) more than 15% of the total clock hours in a program, or 15% of a portion of the program if a student enrolls in less than the total minimum 500 hours.

(f) Refunds shall be made in accordance with §140.344 of this title (relating to Massage School Cancellation and Refund Policy). The effective date of termination for purposes of refunds shall be the last date of absence under subsection (e) of this section. A student whose enrollment is terminated for violation of the attendance policy may not reenter before the start of the next grading period.

(g) A massage therapy educational program may not start students after 10% of the program has been taught except in those cases where appropriate credit for previous education has been given by the department.

(h) Make-up work shall not be authorized for the purpose of removing an absence under subsection (e) of this section.

(i) A leave of absence for reasonable purposes acceptable to the massage therapy educational program shall not exceed the lesser of 30 school days or 60 calendar days.

(1) A student shall be granted only one leave of absence for each 12-month period.

(2) Attendance records shall clearly show the dates for which the leave of absence was granted. A written statement as to why the leave of absence was granted, signed by both the student and the director of the massage therapy educational program indicating approval, shall be placed in the student's file.

(3) If the student fails to return from leave, the student will be automatically terminated and a refund made in accordance with §140.344 of this title. The effective date of termination shall be the last day of the leave of absence.

(j) Each massage therapy educational program must maintain a master record of attendance which clearly indicates the number of scheduled hours each day and the hours of absence for each student. Entries to the attendance log must indicate whether or not a student was in attendance and must be permanent.

§140.347. Massage School Equipment and Facility Requirements.

(a) Each massage therapy education program shall provide adequate equipment in good working order. The equipment required for instruction shall be determined by the program objective(s). The equipment shall be comparable to that commonly found in the practice of massage therapy.

(b) The equipment shall be of sufficient quality to meet the maximum use requirements of the current students, as demanded by the activity patterns of the program.

(c) Equipment not in working order shall be removed from the instructional area, marked as out-of-order, or properly identified as awaiting repair.

(d) The amount of classroom and laboratory space shall meet the use requirements of the maximum number of current students in class with appropriate seating facilities or work stations, as necessitated by the activity patterns of the program.

(e) Enrollment shall not exceed the design characteristics of the student workstations.

(f) The facilities shall meet any state and local ordinances or requirements governing building and safety for the designated use.

(g) If adequate facilities and equipment are available, the following maximum ratios are recommended for the supervised course of instruction, and may be varied at the discretion of the massage therapy educational program to conform to specific conditions:

(1) laboratory--12 tables to 1 instructor and 3 students to 1 table; and

(2) classroom--36 students to 1 instructor.

§140.348. Massage School Transcripts and Records.

(a) Massage schools shall make available for inspection by the department, all records relating to the massage therapy educational program and necessary data required for approval and to show compliance with the Act and this subchapter. A copy of the accreditation authorization and the letter of eligibility from the United States Department of Education shall be available for review, if applicable.

(b) Each massage therapy educational program shall maintain student transcripts of academic records permanently. Original or certified copies of transcripts (official transcripts) shall be available to students and any person authorized by the student at a reasonable charge if the student has fulfilled the financial obligation to the school. Transcripts must be made available to students who have satisfied the terms of the enrollment agreement within 10 calendar days of the date the terms are satisfied. The transcript of a student shall include the following:

(1) name and license number of massage therapy educational program;

(2) the name of the student;

(3) student's social security number;

(4) student's date of birth;

(5) inclusive dates of attendance;

(6) list of subjects and number of course hours taken by the student at the massage therapy educational program;

(7) dates of courses;

(8) address of student;

(9) signature of authorized representative of the massage therapy educational program; and

(10) pass/fail score.

(c) Each massage therapy educational program shall retain the following student records for at least three years:

(1) enrollment agreements and contracts;

(2) written record and evaluation of previous education and training on a form provided by the department;

(3) official transcript(s) from all previous post-secondary schools attended by the student; and

(4) a master student registration list of any person who signs an enrollment agreement, makes a down payment to attend the class, or attends a class. The list must contain:

(A) the date of the entry;

(B) the name of student;

(C) the address of the student including city, state, and zip code;

(D) the telephone number of the student with area code;

(E) the social security number of the student;

(F) the date of birth of the student; and

(G) the name and dates of supervised education course work.

(d) Financial records must be retained as required by federal retention requirements, if applicable.

§140.349. Student Grievances.

(a) Each massage therapy educational program shall establish a written grievance procedure that is disclosed to all students at the time of enrollment. The procedure shall attempt to resolve disputes between students, including drops and graduates, and the school or instructor. Adequate records shall be maintained of grievances and resolutions.

(b) Each massage therapy educational program shall make every effort to resolve grievances and complaints.

(c) A massage school may not discipline or retaliate against a student for filing a complaint with the department.

§140.350. Massage School Fire Safety.

(a) Each massage school shall maintain each instructional location in accordance with applicable state and local fire code(s) and regulations.

(b) The conviction of an owner or operator of a massage school for a violation of a state or local fire code(s) provision shall constitute grounds for disciplinary action under this subchapter.

§140.351. Massage School Sanitation.

(a) Each instructional location shall be maintained in accordance with applicable state and local sanitary or health code(s) and regulations.

(b) An instructional location and all fixed equipment shall be thoroughly cleaned on a routine basis and shall be rendered free from harmful organisms by the application of an accepted bactericidal agent.

(c) Each massage therapy education program must keep the instructional location clean, sanitary, and in good repair at all times.

(d) Toilet facilities shall be kept clean and sanitary without offensive odor and in working order at all times. Restrooms shall not be used as storage rooms.

(e) Each location shall provide hand washing facilities, including hot and cold running water, located near or adjacent to the toilet room or rooms. Hot air blowers or suitable holders for sanitary towels and dispensers for soap shall be provided, and be adequately supplied at all times.

(f) All trash containers must be emptied daily and kept clean by washing or using plastic liners.

(g) Disposable sheets, towels, or protectors which cannot be disinfected will be disposed of in a waste receptacle immediately after use.

(h) Furniture, equipment, and other fixtures shall be of a washable material and kept clean and in good repair. Electrical equipment shall be kept sanitary and safe at all times.

(i) Clean sheets shall be used on each client.

(j) Soiled sheets are to be discarded. After a sheet has been used once, it shall be deposited in a partially closed receptacle, container, or basket, and shall not be used again until properly laundered and disinfected.

(k) Used towels shall be laundered in chlorinated hot water either by regular commercial laundering or by a non-commercial laundering process.

(l) Oil must be kept in closed containers.

(m) Each instructional site must have adequate ventilation.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on August 26, 2008.

TRD-200804647
Lisa Hernandez
General Counsel
Department of State Health Services
Earliest possible date of adoption: October 12, 2008
For further information, please call: (512) 458-7111 x6972

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DIVISION 6. MASSAGE ESTABLISHMENTS

25 TAC §§140.360 - 140.365

STATUTORY AUTHORITY

The proposed new rules are authorized by Occupations Code, §455.051, which authorizes the adoption of rules regarding massage therapists, massage therapy instructors, massage schools, and massage establishments; and Government Code, §531.0055, and Health and Safety Code, §1001.075, which authorize the Executive Commissioner of the Health and Human Services Commission to adopt rules and policies necessary for the operation and provision of health and human services by the department and for the administration of Health and Safety Code, Chapter 1001. Review of the rules implements Government Code, §2001.039.

The proposed new rules affect the Occupations Code, Chapter 455; Government Code, Chapters 531 and 2001; and Health and Safety Code, Chapter 1001.

§140.360. Massage Establishment Application Procedures and Licensure.

(a) Unless otherwise exempt under the Act a place of business that advertises or offers massage therapy or other massage services must be licensed by the department as provided by this section.

(b) A sexually oriented business may not obtain a license from the department or operate as a massage establishment.

(c) An applicant must file an application and license fee with the department. The application shall contain:

(1) the name and address of the massage establishment;

(2) if a corporation:

(A) the name and address of any person who directly or indirectly owns or controls the outstanding shares of stock in the massage establishment;

(B) the name, address and birth dates of the directors; and

(C) a statement that its franchise taxes are current, that the corporation is exempt from payment of the franchise tax, or that it is an out-of-state corporation that is not subject to the franchise tax;

(3) the name, address and birth dates of the sole proprietor or partners;

(4) if any other type of organization, the name, address and birth dates of the owners;

(5) the name, address and birth dates of those persons in a managerial position;

(6) a current list of all establishment employees and/or contractors which includes:

(A) full name;

(B) address;

(C) job title;

(D) license number and expiration date (if licensed as a massage therapist);

(E) birth date;

(F) social security number; and

(G) start date of employment/contract.

(7) the number of the valid sales tax permit issued to the massage establishment, if a sales tax permit is required for the establishment;

(8) a detailed floor plan of the proposed massage establishment that includes entrance and exits, length and width of establishment (in feet), total square feet, and location of restrooms;

(9) the inspection report of the local fire marshal, if required by local authorities or a letter from the county attorney or city official stating that fire inspections are not required in that jurisdiction;

(10) evidence of separation from the establishment of rooms used wholly or in part for residential or sleeping purposes by a solid wall or by a wall with a solid door which shall remain locked during business hours;

(11) a statement of all misdemeanor and felony offenses for which the owners or operators have been convicted, entered a plea of nolo contendere or guilty, or received deferred adjudication; and

(12) effective June 1, 2009, proof of passing the jurisprudence examination.

§140.361. General Requirements for Massage Establishments.

(a) A massage establishment shall employ or contract with only licensed massage therapists to perform massage therapy or other massage services. Documentation of the employment or contract relationship and verification that the licensed massage therapist is a United States citizen or a legal permanent resident with a valid work permit shall be maintained by the massage establishment and made available during an inspection or investigation. Required documentation for each person providing massage therapy or other massage services shall include:

(1) a copy of the current massage therapist license;

(2) proof of eligibility to work in the United States; and

(3) if an employee, a completed I-9 form, or if under an independent contractor or contract labor agreement, a copy of the contract signed by both the owner or operator and the licensed massage therapist.

(b) No massage establishment shall be operated until the department has approved and licensed the establishment.

(c) A massage establishment must maintain separation from rooms used wholly or in part for residential or sleeping purposes by a solid wall or by a wall with a solid door which shall remain locked during business hours.

(d) A massage establishment must display the license along with a current year validation card in a prominent location in the establishment where it is available for inspection by the public.

(e) A license issued by the department is the property of the department and must be surrendered on demand by the department.

(f) A massage establishment is subject to inspection to verify compliance with the Act and this title by authorized personnel of the department at any reasonable time.

(g) All massage establishments shall notify the department in writing of any legal action (civil or criminal) which may concern the operation of the massage establishment and be filed against the massage establishment, its owner, operators, officers, directors, or any employee within 10 working days after the massage establishment, its owner, operators, officers, directors, or any employee has commenced the legal action or been served with legal process. The massage establishment shall submit a file-marked copy of the petition or complaint that has been filed with the court with the written notice.

(h) A massage establishment may not:

(1) employ or contract with an individual who is not a United States citizen or a legal permanent resident with a valid work permit;

(2) employ a minor unless the minor's parent or legal guardian authorizes in writing the minor's employment by the establishment;

(3) allow a nude or partially nude employee to provide massage therapy or other massage services to a customer;

(4) allow any individual, including a client, student, license holder, or employee, to engage in sexual contact in the massage establishment;

(5) allow any individual, including a student, license holder, or employee, to practice massage therapy in the nude or in clothing designed to arouse or gratify the sexual desire of any individual; or

(6) allow an unlicensed student to provide massage therapy or other massage services to the public beyond the department-approved internship.

(i) A massage establishment shall:

(1) properly maintain and secure for each client the initial consultation documents, all session notes, and related billing records;

(2) maintain a current list of all establishment employees and/or contractors at all times which includes:

(A) full name;

(B) address;

(C) job title;

(D) license number and expiration date (if licensed as a massage therapist); and

(E) start date of employment/contract.

(3) make available to the department on request, including during an announced or unannounced site inspection, the information kept as provided by paragraph (1) of this subsection and the current and all previous lists for the previous two years as provided by paragraph (2) of this subsection.

(j) For purposes of this section:

(1) "Nude" means a person who is:

(A) entirely unclothed; or

(B) clothed in a manner that leaves uncovered or visible through less than fully opaque clothing any portion of the breasts below the top of the areola of the breasts or any portion of the genitals or buttocks.

(2) "Sexual contact" includes:

(A) any touching of any part of the genitalia or anus;

(B) any touching of the breasts of a female client, unless the touching is breast massage that is specifically authorized by the client through the signed consultation document referenced in §140.304(a)(3) of this title (relating to Consultation Document);

(C) any offer or agreement to engage in any activity described in subparagraph (A) or (B) of this paragraph;

(D) kissing;

(E) deviate sexual intercourse, sexual contact, sexual intercourse, indecent exposure, sexual assault, prostitution, and promotions of prostitution as described in Penal Code, Chapters 21, 22, and 43, or any offer or agreement to engage in such activities;

(F) any behavior, gesture, or expression that may reasonably be interpreted as inappropriately seductive or sexual; or

(G) inappropriate sexual comments about or to a client, including sexual comments about a person's body.

§140.362. Sanitation Requirements for Massage Establishments.

(a) Each massage establishment shall be maintained in accordance with applicable state and local sanitary or health code(s) and regulations.

(b) A massage establishment and all fixed equipment shall be thoroughly cleaned on a routine basis and shall be rendered free from harmful organisms by the application of an accepted bactericidal agent.

(c) Each massage establishment must maintain its facilities clean, sanitary, and in good repair at all times.

(d) Toilet facilities shall be kept clean and sanitary without offensive odor and in working order at all times. Restrooms shall not be used as storage rooms.

(e) Each massage establishment shall provide hand washing facilities, including hot and cold running water, located near or adjacent to the toilet room or rooms. Hot air blowers or suitable holders for sanitary towels and dispensers for soap shall be provided, and be adequately supplied at all times.

(f) All trash containers must be emptied daily and kept clean by washing or using plastic liners.

(g) Disposable sheets, towels or protectors which cannot be disinfected will be disposed of in a waste receptacle immediately after use.

(h) Furniture, equipment, or other fixtures shall be of a washable material and kept clean and in good repair. Electrical equipment shall be kept sanitary and safe at all times.

(i) Clean sheets shall be used on each client.

(j) Soiled sheets are to be discarded. After a sheet has been used once, it shall be deposited in a partially closed receptacle, container, or basket, and shall not be used again until properly laundered and disinfected.

(k) Used towels shall be laundered in chlorinated hot water either by regular commercial laundering or by a non-commercial laundering process.

(l) Oil must be kept in closed containers.

(m) Each massage establishment must have adequate ventilation.

§140.363. Massage Establishment Renewal.

(a) When issued, a massage establishment license is valid for a two-year period beginning on the date of issuance of the initial license and must be renewed prior to the expiration date.

(b) The renewal date of a license shall be the last day of the month in which the license was originally issued.

(c) At least 30 days prior to the expiration date of the massage establishment's license, the department shall send notice to the massage establishment, including a renewal form, of the expiration date of the license and the amount of the renewal fee due.

(d) The license renewal form shall contain information concerning changes in address or ownership or operators and information regarding conviction, pleas of nolo contendere, or guilty, or receipt of deferred adjudication for crimes or offenses by owners or operators.

(e) A massage establishment has renewed the license when the licensee has mailed the renewal form; a current inspection report of the local fire marshal, if required by local authorities, or a letter from the county attorney or city official stating that fire inspections are not required in that jurisdiction; and the required renewal fee to the department prior to the expiration date of the license. The postmark date shall be considered the date of mailing.

(f) The department shall issue a renewal license to a massage establishment that has met all requirements for renewal.

§140.364. Massage Establishment Exemptions.

(a) In accordance with the Act, a place of business is not required to hold a massage establishment license under the Act if:

(1) the place of business is owned by the federal government, the state, or a political subdivision of the state;

(2) at the place of business, a licensed massage therapist practices as a solo practitioner and:

(A) does not use a business name or assumed name; or

(B) uses a business name or an assumed name and provides the massage therapist's full legal name or license number in each advertisement and each time the business name or assumed name appears in writing;

(3) at the place of business, an acupuncturist, athletic trainer, chiropractor, cosmetologist, midwife, nurse, occupational therapist, perfusionist, physical therapist, physician, physician assistant, podiatrist, respiratory care practitioner, or surgical assistant licensed or certified in this state employs or contracts with a licensed massage therapist to provide massage therapy as part of the person's practice; or

(4) at the place of business, a person offers to perform or performs massage therapy:

(A) for not more than 72 hours in any six-month period; and

(B) as part of a public or charity event, the primary purpose of which is not to provide massage therapy.

(b) Unless the person is exempt from the licensing requirement, a person may not represent that the person is a massage estab-

lishment unless the person holds an appropriate license under this subchapter.

§140.365. Massage Establishment Change of Ownership or Change of Location.

(a) No massage establishment license shall be transferred, bartered, or sold to another person or owner. The new owner of a massage establishment must apply for a license as a new applicant. A massage establishment may not operate under a new owner until a massage establishment license is issued by the department to the new owner. A license issued under this section is not transferable.

(b) The department may consider the addition or deletion of any person defined as an owner in §140.300(19) of this title (relating to Definitions) as a change in ownership. The massage establishment must notify the department of the change in ownership a minimum of 60 days before the change in ownership to request that the department, in lieu of a full application, accept a partial application.

(c) The department may require submission of a full application for approval for a change in ownership if:

(1) the department has a reasonable basis to believe the change in ownership of the establishment may significantly affect the establishment's continued ability to meet the criteria for approval; or

(2) the establishment fails to file notice of the change of ownership at least 60 days prior to the ownership transfer.

(d) The department may require a partial application for approval for a change in ownership if the department reasonably believes the change in ownership will not significantly affect the establishment's continued ability to meet the criteria for approval.

(e) No massage establishment license shall be transferred to another location. If the location of an establishment changes, a new application for licensure must be submitted and approved before the establishment may provide massage therapy or other massage therapy services.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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Lisa Hernandez
General Counsel
Department of State Health Services
Earliest possible date of adoption: October 12, 2008
For further information, please call: (512) 458-7111 x6972

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DIVISION 7. COMPLAINTS, VIOLATIONS AND SUBSEQUENT DISCIPLINARY ACTIONS

25 TAC §§140.370 - 140.376

STATUTORY AUTHORITY

The proposed new rules are authorized by Occupations Code, §455.051, which authorizes the adoption of rules regarding massage therapists, massage therapy instructors, massage schools, and massage establishments; and Government Code, §531.0055, and Health and Safety Code, §1001.075, which authorize the Executive Commissioner of the Health and Human Services Commission to adopt rules and policies necessary for the operation and provision of health and human services by the department and for the administration of Health and Safety Code, Chapter 1001. Review of the rules implements Government Code, §2001.039.

The proposed new rules affect the Occupations Code, Chapter 455; Government Code, Chapters 531 and 2001; and Health and Safety Code, Chapter 1001.

§140.370. Filing Complaints.

(a) Any person may complain to the department alleging that a massage therapist, massage school, massage therapy instructor, massage establishment, or another person or business has violated the Act or this subchapter.

(b) A person wishing to file a complaint against a massage therapist, massage school, massage therapy instructor, massage establishment, or another person or business shall notify the department. The initial notification of a complaint may be in writing, by telephone, or by personal visit to the office of the massage therapy licensing program.

(c) Official complaints must be in writing either through correspondence or on department forms. Upon receipt of a complaint, the department shall send to the complainant an acknowledgment letter and the department's complaint form, which the complainant may complete and return.

(d) The department shall not investigate anonymous complaints.

§140.371. Investigation of Complaints.

(a) The department shall make an initial investigation.

(b) If the department determines that the information in the complaint does not allege a violation of the Act or rules or does not fall within the department's jurisdiction, the department shall advise the complainant and, if possible, refer the complainant to the appropriate governmental agency for handling such a complaint.

(c) The department shall, at least as frequently as quarterly, notify the parties to the complaint of the status of the complaint until its final disposition, except in cases where such notice would jeopardize an undercover investigation.

(d) If an investigation is conducted, the investigator shall attempt to contact the complainant to discuss the complaint.

(e) If the department determines that there are insufficient grounds to support the complaint, the department shall dismiss the complaint and give written notice of the dismissal to the licensee or person against whom the complaint has been filed and the complainant.

(f) The department shall determine whether the complaint fits within the category of a serious complaint affecting the health or safety of clients or other persons.

(g) If the department determines that there are sufficient grounds to support the complaint, the department may propose to deny, suspend, revoke, or refuse to renew a license, reprimand a licensee or impose an administrative penalty.

§140.372. Grounds for Denial of License or Disciplinary Action.

(a) The department may refuse to issue a license to a person, suspend or revoke the license of a person, or place a person licensed under the Act on probation if the person:

(1) obtains a license by fraud, misrepresentation, or concealment of material facts;

(2) sells, barters, or offers to sell or barter a license;

(3) violates a rule adopted by the executive commissioner;

(4) engages in unprofessional conduct that endangers or is likely to endanger the health, welfare, or safety of the public;

(5) violates an order or ordinance adopted by a political subdivision under Local Government Code, Chapter 243; or

(6) violates this subchapter.

(b) The department shall revoke the license of a person if:

(1) the person is convicted of, enters a plea of nolo contendere or guilty to, or receives deferred adjudication for an offense involving prostitution or another sexual offense; or

(2) the department determines the person has practiced or administered massage therapy at or for a sexually oriented business.

(c) The department shall revoke the license of a person licensed as a massage school or massage establishment if the department determines that:

(1) the school or establishment is a sexually oriented business; or

(2) an offense involving prostitution or another sexual offense that resulted in a conviction for the offense, a plea of nolo contendere or guilty to the offense, or a grant of deferred adjudication for the offense occurred on the premises of the school or establishment.

(d) If the department finds a person has violated the Act or rules adopted under the Act or any other law or rule relating to the practice of massage therapy in Texas, the following sanctions and penalties apply:

(1) denial of the person's application for licensure;

(2) issuance of a written warning;

(3) limitation or restriction of the licensee's practice for a specified time;

(4) suspension of the license;

(5) revocation of the license;

(6) required participation by the licensee in one or more education programs;

(7) issue a formal reprimand;

(8) probation of any penalty imposed;

(9) acceptance of the voluntary surrender of a license; or

(10) assessment of an administrative penalty not to exceed $1000 per day for each violation.

§140.373. Formal Hearings.

(a) A formal hearing and all related proceedings shall be conducted in accordance with the provisions of the Administrative Procedure Act (APA), Government Code, Chapter 2001, applicable state and federal statutes, the Rules of Practice and Procedures of the State Office of Administrative Hearings (SOAH), and this subchapter.

(b) An administrative law judge (ALJ) appointed by the SOAH shall preside over and conduct the hearing. A formal hearing shall be held in Travis County, Texas, unless otherwise determined by the ALJ or upon agreement of the parties.

(c) After the hearing, the ALJ shall prepare a proposal for decision and provide copies of same to all parties to the hearing.

(d) The final order or decision will be rendered by the commissioner or commissioner's designee.

§140.374. Suspension of License for Failure to Pay Child Support.

(a) On receipt of a final court order or attorney general's order suspending a license due to failure to pay child support, or for failure to comply with a child custody order, the department shall immediately determine if a license has been issued to the obligator named on the order, and, if a license has been issued:

(1) record the suspension of the license in the department's records;

(2) report the suspension as appropriate; and

(3) demand surrender of the suspended license.

(b) The department shall implement the terms of the final court or attorney general's order suspending a license without additional review or hearing. The department will provide notice as appropriate to the licensee or to others concerned with the license.

(c) The department may not modify, remand, reverse, vacate, or stay a court or attorney general's order suspending a license issued under the Family Code, Chapter 232, and may not review, vacate, or reconsider the terms of an order.

(d) A licensee who is the subject of a final court or attorney general's order suspending his or her license is not entitled to a refund for any fee paid to the department.

(e) If a suspension overlaps a license renewal period, an individual with a license suspended under this section shall comply with the normal renewal procedures in the Act and this subchapter; however, the license will not be renewed until subsection (g) of this section is met.

(f) An individual who continues to use the title(s) massage therapist, massage therapy instructor, massage school, or massage establishment or to engage in any activity for which a license is required after the issuance of a court or attorney general's order suspending the license is liable for the same civil and criminal penalties provided for engaging in the prohibited activity without a license or while a license is suspended as any other license holder of the department.

(g) On receipt of a court or attorney general's order vacating or staying an order suspending a license, the department shall promptly issue the affected license to the individual if the individual is otherwise qualified for a license.

§140.375. Informal Disposition.

(a) Informal disposition of any complaint or contested case involving a licensee or an applicant for licensure may be made through an informal conference held to determine whether an agreed settlement order may be secured.

(b) An informal conference shall be voluntary.

(c) A conference shall be informal and shall not follow the procedures established in this subchapter for contested cases and formal hearings.

(d) The licensee, the licensee's attorney, and department staff may question witnesses, make relevant statements, present statements of persons not in attendance, and present such other evidence as may be appropriate.

(e) The complainant shall not be considered a party in the informal conference but shall be given an opportunity to be heard if the complainant attends. Any written statement submitted by the complainant shall be reviewed at the conference.

(f) At the conclusion of the informal conference, department representatives may make recommendations for informal disposition of the complaint or contested case or for any disciplinary action authorized by the Act. The department may also:

(1) conclude that the department lacks jurisdiction;

(2) conclude that a violation of the Act or this subchapter has not been established;

(3) order that the investigation be closed; or

(4) refer the matter for further investigation.

§140.376. Licensing of Persons with Criminal Background.

(a) Notwithstanding actions set out in §140.372(b) and (c) of this title (relating to Grounds for Denial of License or Disciplinary Action), the department may suspend or revoke a license, disqualify a person from receiving a license or deny to a person the opportunity to be examined for a license because of the person's conviction of a felony or misdemeanor if the crime directly relates to the duties and responsibilities of a massage therapist, massage therapy instructor, massage school, or massage establishment.

(b) In considering whether a criminal conviction directly relates to the occupation of a massage therapist, the department shall consider:

(1) the nature and seriousness of the crime;

(2) the relationship of the crime to the purposes for requiring a license. The following felonies and misdemeanors relate to the license of a massage therapist, massage therapy instructor, massage school or massage establishment because these criminal offenses indicate an unwillingness or an inability to be able to perform as a massage therapist:

(A) the misdemeanor of knowingly or intentionally acting as a massage therapist without a license issued under the Act;

(B) a misdemeanor and/or felony offense involving moral turpitude;

(C) a misdemeanor and/or felony offense under various titles of the Texas Penal Code:

(i) Title 5 concerning offenses against the person;

(ii) Title 7 concerning offenses against property;

(iii) Title 9 concerning offenses against public order and decency;

(iv) Title 10 concerning offenses against public health, safety, and morals; and

(v) Title 4 concerning offenses of attempting or conspiring to commit any offenses in this subsection;

(vi) the misdemeanors and felonies listed in clauses (i) - (v) of this subparagraph are not inclusive in that the department may consider other particular crimes in special cases in order to promote the intent of the Act and this subchapter;

(3) the extent to which a license might offer an opportunity to engage in further criminal activity of the same type as that in which the person previously had been involved; and

(4) the relationship of the crime to the ability, capacity, or fitness required to perform the duties and discharge the responsibilities of a massage therapist. In determining the present fitness of a person, the department shall consider the evidence described in the Occupations Code, Chapter 53, relating to Consequences of Criminal Conviction.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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Lisa Hernandez
General Counsel
Department of State Health Services
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CHAPTER 141. MASSAGE THERAPISTS

The Executive Commissioner of the Health and Human Services Commission, on behalf of the Department of State Health Services (department), proposes the repeal of §§141.1 - 141.3, 141.5 - 141.7, 141.10, 141.11, 141.13 - 141.17, 141.20 - 141.47, 141.50 - 141.55, and 141.60 - 141.66, concerning the licensing and regulation of massage therapists, massage therapy instructors, massage schools, and massage establishments.

BACKGROUND AND PURPOSE

The proposed repeals are necessary to consolidate existing Professional Licensing and Certification Unit program rules in 25 Texas Administrative Code (TAC), Chapter 140, Health Professions Regulation. The new rules transfer and update existing language, and include substantive changes to implement portions of House Bill (HB) 2644, 80th Legislature, Regular Session (2007) which amended Occupations Code, Chapter 455, as well as other changes to update, strengthen, and clarify the rules.

Proposed changes which implement HB 2644 include an increase in the minimum educational standard for a massage therapist license from 300 to a minimum of 500 hours and extensive corresponding changes and clarifications to the requirements for licensed massage schools; elimination of the requirement for a practical examination; elimination of the independent massage therapy instructor license; elimination of language relating to licensure of unlicensed applicants from another state where licensure is not available; new language relating to examinations; and new language which mirrors the statute relating to exemptions from licensure for certain massage establishments.

Additional changes include the approval of online and correspondence courses in non-massage therapy technique subjects for continuing education credit, a requirement that a licensee to honor or refund an unexpired gift certificate, a new requirement that a massage establishment maintain additional records, including a list of current employees and contractors along with proof of eligibility to work in the United States at all times and provide it to the department upon request, and a new requirement for a jurisprudence examination for new applicants for a license as a massage therapist, massage establishment, or preapproved continuing education provider starting in 2009.

Government Code, §2001.039, requires that each state agency review and consider for readoption each rule adopted by that agency pursuant to the Government Code, Chapter 2001 (Administrative Procedure Act). Sections 141.1 - 141.3, 141.5 - 141.7, 141.10, 141.11, 141.13 - 141.17, 141.20 - 141.47, 141.50 - 141.55, and 141.60 - 141.66 have been reviewed and the department has determined that reasons for adopting the sections continue to exist because rules on this subject are needed; however, the department is proposing to repeal the existing sections and adopt the rules in 25 TAC, Chapter 140, Health Professions Regulation.

SECTION-BY-SECTION SUMMARY

The repeal of §§141.1 - 141.3, 141.5 - 141.7, 141.10, 141.11, 141.13 - 141.17, 141.20 - 141.47, 141.50 - 141.55, and 141.60 - 141.66 is necessary to combine the Professional Licensing and Certification Unit rules in one chapter, 25 TAC, Chapter 140, Health Professions Regulation.

FISCAL NOTE

Cindy Bourland, Manager, Professional Licensing and Certification Unit, has determined that for each year of the first five-year period that the sections are in effect, there will be fiscal implications to state government as a result of enforcing or administering the sections as proposed. The effect on state government will be an increase in revenue of $135,000 each fiscal year 2008 - 2012. There will be no fiscal implications to local government. Additional fees will be received for the issuance and renewal of massage therapy establishment licenses to businesses formerly exempt from licensure. Issuance of additional licenses, and additional massage establishment inspections will be required.

SMALL AND MICRO-BUSINESS IMPACT ANALYSIS

Ms. Bourland has also determined that there will be an effect on small businesses or micro-businesses required to comply with the sections as proposed. This determination was made because additional fees will be required for the issuance and renewal of massage therapy establishment licenses to businesses formerly exempt from licensure. Regarding §140.364, there is an anticipated economic cost to businesses which are required to comply with the sections as proposed of $300 every two years. There will be an economic impact to massage therapy schools due to schools being allowed to offer massage therapy educational programs which exceed 500 hours of instruction, which is the minimum number of hours required for massage therapist licensure. The extent of the impact cannot be estimated because applying for approval to offer these programs is voluntary and the availability of these longer programs may have varying positive and/or negative effects on the revenue and costs of individual schools. There is no anticipated negative impact on local employment.

ECONOMIC IMPACT STATEMENT

Regarding §140.364, the purpose of the rule is to clearly set forth any exemptions to the requirement for a business to hold a massage establishment license. The rule language as proposed exactly repeats the language in HB 2644, which also eliminated the department's authority to adopt rules granting additional exemptions. An estimated 900 small or micro-businesses will be required to comply with the rules as proposed. Less than 100 of these small businesses are already licensed as massage schools.

REGULATORY FLEXIBILITY ANALYSIS

The department considered the following regulatory options in determining how to implement the new requirement for formerly unlicensed businesses to hold a massage establishment license. Regarding §140.364, the options not chosen included not adopting the rule and establishing different, less burdensome standards for the operation of small businesses. It was determined that failure to adopt rules would result in unclear rules which could subject unaware businesses to criminal prosecution for operating without a license under the statute. It was also determined that failure to adopt and enforce uniform rules related to the standards for the operation of a massage establishment could pose a risk to public health, as most currently licensed massage establishments are also small businesses. It was however determined that licensed massage schools were already paying inspection fees, so the proposed establishment fees for these small businesses which also operate massage establishments were decreased from $300 to $100. The department is also working to bring businesses subjected to the new requirements in HB 2644 into voluntary compliance over the course of the next year, and therefore anticipates a delay in the imposition of the fees to approximately 450 affected businesses.

PUBLIC BENEFIT

In addition, Ms. Bourland has also determined that for each year of the first five years the sections are in effect, the public will benefit from the adoption of the sections. The public benefit anticipated as a result of enforcing or administering the sections is to continue to ensure public health and safety through the licensing and regulation of massage therapists, massage therapy instructors, massage schools, and massage establishments.

REGULATORY ANALYSIS

The department has determined that this proposal is not a "major environmental rule" as defined by Government Code, §2001.0225. "Major environmental rule" is defined to mean a rule the specific intent of which is to protect the environment or reduce risk to human health from environmental exposure and that may adversely affect, in a material way, the economy, a sector of the economy, productivity, competition, jobs, the environment or the pubic health and safety of a state or a sector of the state. This proposal is not specifically intended to protect the environment or reduce risks to human health from environmental exposure.

TAKINGS IMPACT ASSESSMENT

The department has determined that the proposal does not restrict or limit an owner's right to his or her property that would otherwise exist in the absence of government action and, therefore, does not constitute a taking under Government Code, §2007.043.

PUBLIC COMMENT

Comments on the proposal may be submitted to Yvonne Feinleib, Program Director, Massage Therapy Licensing Program, Professional Licensing and Certification Unit, Division for Regulatory Services, Department of State Health Services, 1100 West 49th Street, Austin, Texas 78756, (512) 834-6616 or by email to massage@dshs.state.tx.us. When emailing comments, please indicate "Comments on Proposed Rules" in the subject line. Comments will be accepted for 30 days following publication of the proposal in the *Texas Register*.

LEGAL CERTIFICATION

The Department of State Health Services General Counsel, Lisa Hernandez, certifies that the proposed rules have been reviewed by legal counsel and found to be within the state agencies' authority to adopt.

SUBCHAPTER A. THE DEPARTMENT

25 TAC §§141.1 - 141.3

(Editor's note: The text of the following sections proposed for repeal will not be published. The sections may be examined in the offices of the Department of State Health Services or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin.)

STATUTORY AUTHORITY

The proposed repeals are authorized by Occupations Code, §455.051, which authorizes the adoption of rules regarding massage therapists, massage therapy instructors, massage schools, and massage establishments; and Government Code, §531.0055, and Health and Safety Code, §1001.075, which authorize the Executive Commissioner of the Health and Human Services Commission to adopt rules and policies necessary for the operation and provision of health and human services by the department and for the administration of Health and Safety Code, Chapter 1001. Review of the rules implements Government Code, §2001.039.

The proposed repeals affect the Occupations Code, Chapter 455; Government Code, Chapters 531 and 2001; and Health and Safety Code, Chapter 1001.

§141.1. Definitions.
§141.2. Fees.
§141.3. Processing Applications.
This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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Lisa Hernandez
General Counsel
Department of State Health Services
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SUBCHAPTER B. CODE OF ETHICS

25 TAC §§141.5 - 141.7

(Editor's note: The text of the following sections proposed for repeal will not be published. The sections may be examined in the offices of the Department of State Health Services or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin.)

STATUTORY AUTHORITY

The proposed repeals are authorized by Occupations Code, §455.051, which authorizes the adoption of rules regarding massage therapists, massage therapy instructors, massage schools, and massage establishments; and Government Code, §531.0055, and Health and Safety Code, §1001.075, which authorize the Executive Commissioner of the Health and Human Services Commission to adopt rules and policies necessary for the operation and provision of health and human services by the department and for the administration of Health and Safety Code, Chapter 1001. Review of the rules implements Government Code, §2001.039.

The proposed repeals affect the Occupations Code, Chapter 455; Government Code, Chapters 531 and 2001; and Health and Safety Code, Chapter 1001.

§141.5. General Ethical Requirements.
§141.6. Sexual Misconduct.
§141.7. Advertising.
This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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Lisa Hernandez
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Department of State Health Services
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SUBCHAPTER C. MASSAGE THERAPISTS

25 TAC §§141.10, 141.11, 141.13 - 141.17

(Editor's note: The text of the following sections proposed for repeal will not be published. The sections may be examined in the offices of the Department of State Health Services or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin.)

STATUTORY AUTHORITY

The proposed repeals are authorized by Occupations Code, §455.051, which authorizes the adoption of rules regarding massage therapists, massage therapy instructors, massage schools, and massage establishments; and Government Code, §531.0055, and Health and Safety Code, §1001.075, which authorize the Executive Commissioner of the Health and Human Services Commission to adopt rules and policies necessary for the operation and provision of health and human services by the department and for the administration of Health and Safety Code, Chapter 1001. Review of the rules implements Government Code, §2001.039.

The proposed repeals affect the Occupations Code, Chapter 455; Government Code, Chapters 531 and 2001; and Health and Safety Code, Chapter 1001.

§141.10. Qualifications for Licensure as a Massage Therapist.
§141.11. Application Procedures and Documentation.
§141.13. Provisional License.
§141.14. Examination.
§141.15. Massage Therapy Licenses.
§141.16. Massage Therapist License Renewal.
§141.17. Active Military Duty.
This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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SUBCHAPTER D. CONTINUING EDUCATION REQUIREMENTS AND DOCUMENTATION

25 TAC §§141.20 - 141.25

(Editor's note: The text of the following sections proposed for repeal will not be published. The sections may be examined in the offices of the Department of State Health Services or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin.)

STATUTORY AUTHORITY

The proposed repeals are authorized by Occupations Code, §455.051, which authorizes the adoption of rules regarding massage therapists, massage therapy instructors, massage schools, and massage establishments; and Government Code, §531.0055, and Health and Safety Code, §1001.075, which authorize the Executive Commissioner of the Health and Human Services Commission to adopt rules and policies necessary for the operation and provision of health and human services by the department and for the administration of Health and Safety Code, Chapter 1001. Review of the rules implements Government Code, §2001.039.

The proposed repeals affect the Occupations Code, Chapter 455; Government Code, Chapters 531 and 2001; and Health and Safety Code, Chapter 1001.

§141.20. Hour Requirements for Continuing Education.

§141.21. Acceptable Continuing Education.

§141.22. Activities Unacceptable as Continuing Education.

§141.23. Procedures for Approval of Continuing Education.

§141.24. Pre-approved Continuing Education Providers.

§141.25. Reporting Continuing Education.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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SUBCHAPTER E. MASSAGE SCHOOLS AND MASSAGE THERAPY INSTRUCTORS

25 TAC §§141.26 - 141.47

(Editor's note: The text of the following sections proposed for repeal will not be published. The sections may be examined in the offices of the Department of State Health Services or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin.)

STATUTORY AUTHORITY

The proposed repeals are authorized by Occupations Code, §455.051, which authorizes the adoption of rules regarding massage therapists, massage therapy instructors, massage schools, and massage establishments; and Government Code, §531.0055, and Health and Safety Code, §1001.075, which authorize the Executive Commissioner of the Health and Human Services Commission to adopt rules and policies necessary for the operation and provision of health and human services by the department and for the administration of Health and Safety Code, Chapter 1001. Review of the rules implements Government Code, §2001.039.

The proposed repeals affect the Occupations Code, Chapter 455; Government Code, Chapters 531 and 2001; and Health and Safety Code, Chapter 1001.

§141.26. General Provisions and Inspections.

§141.27. Application Procedures and Documentation.

§141.28. Administrative Personnel.

§141.29. Massage Therapy Instructors.

§141.30. Financial Stability.

§141.31. Change of Ownership.

§141.32. License Renewal.

§141.33. Locations.

§141.34. Curriculum and Internship for the Basic Course of Instruction.

§141.35. Advanced Course Work.

§141.36. Admission Requirements.

§141.37. Enrollment Procedures.

§141.38. Tuition and Fees.

§141.39. Conduct Policy.

§141.40. Cancellation and Refund Policy.

§141.41. Minimum Progress Standards.

§141.42. Attendance Standards.

§141.43. Equipment and Facility Requirements.

§141.44. Transcripts and Records.

§141.45. Student Grievances.

§141.46. Fire Safety.

§141.47. Sanitation.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on August 26, 2008.

TRD-200804654
Lisa Hernandez
General Counsel
Department of State Health Services
Earliest possible date of adoption: October 12, 2008
For further information, please call: (512) 458-7111 x6972

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SUBCHAPTER F. MASSAGE ESTABLISHMENTS

25 TAC §§141.50 - 141.55

(Editor's note: The text of the following sections proposed for repeal will not be published. The sections may be examined in the offices of the Department of State Health Services or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin.)

STATUTORY AUTHORITY

The proposed repeals are authorized by Occupations Code, §455.051, which authorizes the adoption of rules regarding massage therapists, massage therapy instructors, massage schools, and massage establishments; and Government Code,

§531.0055, and Health and Safety Code, §1001.075, which authorize the Executive Commissioner of the Health and Human Services Commission to adopt rules and policies necessary for the operation and provision of health and human services by the department and for the administration of Health and Safety Code, Chapter 1001. Review of the rules implements Government Code, §2001.039.

The proposed repeals affect the Occupations Code, Chapter 455; Government Code, Chapters 531 and 2001; and Health and Safety Code, Chapter 1001.

§141.50. Massage Establishment Application Procedures and Licensure.

§141.51. General Requirements for Massage Establishments.

§141.52. Sanitation Requirements for Massage Establishments.

§141.53. Massage Establishment Renewal.

§141.54. Exemptions.

§141.55. Change of Ownership and Control or Location.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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Lisa Hernandez
General Counsel
Department of State Health Services
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SUBCHAPTER G. COMPLAINTS, VIOLATIONS AND SUBSEQUENT DISCIPLINARY ACTIONS

25 TAC §§141.60 - 141.66

(Editor's note: The text of the following sections proposed for repeal will not be published. The sections may be examined in the offices of the Department of State Health Services or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin.)

STATUTORY AUTHORITY

The proposed repeals are authorized by Occupations Code, §455.051, which authorizes the adoption of rules regarding massage therapists, massage therapy instructors, massage schools, and massage establishments; and Government Code, §531.0055, and Health and Safety Code, §1001.075, which authorize the Executive Commissioner of the Health and Human Services Commission to adopt rules and policies necessary for the operation and provision of health and human services by the department and for the administration of Health and Safety Code, Chapter 1001. Review of the rules implements Government Code, §2001.039.

The proposed repeals affect the Occupations Code, Chapter 455; Government Code, Chapters 531 and 2001; and Health and Safety Code, Chapter 1001.

§141.60. Filing Complaints.

§141.61. Investigation of Complaints.

§141.62. Grounds for Denial of License or Disciplinary Action.

§141.63. Formal Hearings.

§141.64. Suspension of License for Failure to Pay Child Support.

§141.65. Informal Disposition.

§141.66. Licensing of Persons with Criminal Background.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on August 26, 2008.

TRD-200804656
Lisa Hernandez
General Counsel
Department of State Health Services
Earliest possible date of adoption: October 12, 2008
For further information, please call: (512) 458-7111 x6972

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TITLE 28. INSURANCE

PART 1. TEXAS DEPARTMENT OF INSURANCE

CHAPTER 19. AGENTS' LICENSING SUBCHAPTER B. MEDICARE ADVANTAGE PLANS, MEDICARE ADVANTAGE PRESCRIPTION DRUG PLANS, AND MEDICARE PART D PLANS

28 TAC §§19.101 - 19.103

The Texas Department of Insurance proposes new Subchapter B, §§19.101 - 19.103, establishing qualifying license types for persons marketing Medicare Advantage Plans, Medicare Advantage Prescription Drug Plans, and Prescription Drug Plans (Medicare plans) under federal marketing guidelines specified in "Medicare Marketing Guidelines for: Medicare Advantage Plans (MAs), Medicare Advantage Prescription Drug Plans (MA-PDs), Prescription Drug Plans (PDPs) and 1876 Cost Plans," second revision, July 25, 2006, published by the Centers for Medicare and Medicaid Services (CMS guidelines), and establishing a requirement for reporting persons in violation of this subchapter. The Centers for Medicare and Medicaid Services (CMS) has published in the May 16, 2008, issue of the Federal Register proposed amendments to the July 25, 2006, CMS guidelines. Those amendments, if adopted, would be consistent with the existing CMS guidelines as described herein and this proposal. Additionally, on July 15, 2008, Congress adopted the Medicare Improvements for Patients and Providers Act of 2008, Public Law 110-275 (MIPPA). Among other matters, MIPPA §103(d) requires Medicare Advantage organizations to use state-licensed insurance agents to sell Medicare Plans and to comply with state laws regulating agent appointment and termination reporting requirements. The Commissioner adopted on an emergency basis §§19.101 - 19.104, effective November 9, 2007, and published in the November 23, 2007, issue of the *Texas Register* (32 TexReg 8389) (Emergency Rule). Those sections expired by operation of law on May 6, 2008, and will be replaced by this proposal.

This proposal is necessary to maintain effective regulation of the insurance industry by safeguarding Texas' senior citizens and other individuals eligible for Medicare plans (Medicare beneficiaries) who are confronting significant healthcare decisions. CMS

Guidelines and now MIPPA §103(d)(1), which amends §1851(h) of the Social Security Act (42 U.S.C. 1395w-21(h), require that Medicare Advantage organizations only use agents who have been licensed under state law to sell Medicare plans.

This proposal uses the term *market* rather than sell with respect to licensed agents because *marketing* is used in the CMS Marketing guidelines and fully encompasses the concept of *soliciting*, which is a primary function of an agent under the Insurance Code §4001.051(b). Thus, to the extent that federal law and CMS guidelines require that a Medicare Advantage organization utilize a state-licensed agent to market or sell a Medicare plan, this proposal designates that the general life, accident, and health insurance agent and general property and casualty insurance agent license types are the only Texas license types eligible to comply with that federal requirement. A licensed agent not holding a general life, accident, and health insurance agent or general property and casualty insurance agent license as required in this proposal would not be authorized to market a Medicare plan unless federal law and CMS guidelines authorize an unlicensed person to engage in that specific marketing activity.

The Department has continued to receive reports that Medicare beneficiaries of this state are being fraudulently and dishonestly deceived by licensed insurance agents into enrolling in Medicare plans that are unsuitable for those Medicare beneficiaries due to either other insurance or existing medical treatment concerns. Enrollment in an unsuitable plan often places Medicare beneficiaries at severe medical risk when they are no longer able to obtain continuing medical care from their existing physicians and care facilities and financial risk when the costs of the replacement plans exceed those of their existing insurance and other suitable available coverage. Even if care is available, the fact that it is only available from an unfamiliar and/or limited source may result in Medicare beneficiaries, to their detriment, not seeking or receiving the care to which they are justly entitled and possible irreversible physical decline or death.

Prior to the adoption of the emergency rule, the Department received reports that temporary agents in particular were engaging in the fraudulent and dishonest marketing activities. Pursuant to §§4001.152 - 4001.154 of the Insurance Code, temporary agents must be issued a license immediately upon receipt of the license application and further, even without receiving a license, temporary agents may begin acting as an agent eight days after the application was delivered or mailed to the Department. Temporary agents are appointed by insurers, health maintenance organizations, or other insurance agents. Temporary agents are not required to pass the Department's qualifying licensing examination demonstrating knowledge of the products they will be selling, or to have completed the Department's criminal history background check. The Department uses fingerprint-based criminal history background checks through the Texas Department of Public Safety (DPS) and the Federal Bureau of Investigation (FBI). These checks take approximately one business week to complete if the fingerprint record is submitted electronically and a month or more to complete if the fingerprint record is submitted using paper cards. Electronic submissions are available to individuals through the Department's examination vendor; however, electronic submissions are not required. Based on the statutory issuance requirements, either criminal history background check method leaves open a potential period for a temporary agent to begin marketing Medicare plans before the background check can be completed and the temporary licensee ordered to cease and desist or the license is revoked. Pursuant to the Insurance Code §4001.155, a temporary license is valid for 90 days after issuance. Pursuant to §4001.156 of the Insurance Code, a temporary license may not be issued to or renewed by the same individual more than once in a consecutive six-month period. Therefore, the individuals who obtain temporary licenses are able to market Medicare plans for an entire open enrollment period without meeting all of the requisites for individual insurance agents who are licensed pursuant to §§4001.105, 4001.106, 4056.052, 4056.053, or 4056.054 of the Insurance Code.

In this proposal, the term *temporary license* is used to refer to a license issued under §§4001.152 - 4001.154 of the Insurance Code. The term *permanent license* is used to refer to a license issued to a individual satisfying the qualifications required for Texas resident insurance agents licensed under the Insurance Code §4001.105 and §4001.106, and nonresident insurance agents licensed under the Insurance Code §§4056.052 - 4056.054.

The emergency rule was adopted prior to the 2008 plan year annual enrollment period for Medicare plans, which was November 15, 2007, through December 31, 2007. That enrollment period has expired; however, individuals continue to qualify for Medicare plans throughout the year, and subsequent annual enrollment periods will continue in this and future years. The brief recurring annual open enrollment period presents an opportunity for individuals that would not otherwise be able to qualify for a permanent agent license to obtain access to a significant portion of this market with a temporary license. This short period, in which millions of senior citizens and other Medicare beneficiaries will again be seeking to purchase essential coverage, will allow an untrained, unqualified, or unscrupulous insurance agent to take advantage of tens or hundreds of individuals who themselves are under substantial time pressure to make complex and important healthcare choices. The open enrollment period situation is unlike normal marketing environments in which insurance agents must locate and solicit potential consumers and where those consumers have more time to consider and make informed decisions on such important health coverage matters. However, simply because the number of Medicare beneficiaries seeking coverage at other times throughout the year are fewer, the harm that can be inflicted by an untrained, unqualified, or unscrupulous insurance agent on a Medicare beneficiary seeking to enroll in a Medicare plan is still just as great and Medicare beneficiaries remain subject to fraudulent and dishonest marketing activities. Further, an emergency rule expires by operation of law and cannot under the law be re-adopted as an emergency rule even to address the serious situation that is presented by the annual open enrollment period for Medicare plans. Therefore, a permanent solution is necessary to prevent the reoccurrence of complaints resulting from the activities of temporary agents.

This proposal is necessary to address, in a comprehensive manner, the problems demonstrated by the reports of fraud and abuse resulting from untrained, unqualified, and unscrupulous temporary insurance agents actively marketing Medicare plans to unsuspecting Medicare beneficiaries. Each of these proposals are appropriate and necessary preventive measures to protect Texas' senior citizens and other Medicare beneficiaries by enhancing the Department's ability to regulate insurance agents engaging in these activities and the insurers, heath maintenance organizations and permanent agents that appoint temporary agents. Additionally, the proposal will require insurers, health maintenance organizations, and agents to report violations of this subchapter. Each of these proposals will work in conjunction with the Department's enforcement authority to help prevent the harm that untrained, unqualified, and un-

scrupulous temporary agents may try to inflict upon Texas' senior citizens and other Medicare beneficiaries by providing an additional means to address the problem.

Proposed §19.102 will limit the marketing of Medicare plans in this state to insurance agents holding permanent general life, accident and health insurance agent licenses and general property and casualty insurance agent licenses who are appointed by a property and casualty insurer authorized to write Medicare plans in this state. This limitation is based on the Commissioner's authority under the Insurance Code §4051.051(3) and §4054.051(9) to determine which classification of licensed insurance agent is authorized to write any other kind of insurance for the protection of the insurance consumers of this state. Federal law and CMS guidelines clearly recognize that Medicare plans are federal benefits and contemplate that state law may define a particular license type as being suitable to sell Medicare plans. The CMS guidelines provide: "It is of paramount importance to CMS that a beneficiary enrolls in a plan that the beneficiary chooses based on the beneficiary's needs." (CMS guidelines, page 129). Further, CMS guidelines provide: "An organization must utilize only a state licensed, certified, or registered individual to perform marketing, if a state has such a marketing requirement." (CMS guidelines, page 130). Based on the Commissioner's authority under the Insurance Code §4051.051(3) and §4054.051(9) this proposal continues the Commissioner's earlier determination limiting the marketing of Medicare plans in this state to insurance agents holding permanent general life, accident and health insurance agent licenses and, as appropriate, general property and casualty insurance agent licenses for the protection of the insurance consumers of this state. The determination in this proposal does not extend the authority to market Medicare plans to personal lines property and casualty insurance agents acting in compliance with the Insurance Code §4051.402(b).

Proposed §19.102 also will prohibit insurers, health maintenance organizations, or insurance agents from allowing agents that do not hold permanent general life, accident and health insurance agent licenses or general property and casualty insurance agent licenses who are acting for a property and casualty insurer engaged in selling Medicare plans or unlicensed persons to assist in the enrollment of individuals in Medicare plans unless that activity is specifically authorized under Medicare plans under the CMS Guidelines to be performed by unlicensed persons.

Proposed §19.102 does not limit the authority of insurers, health maintenance organizations, or agents, including temporary agents, to market or sell insurance products authorized under the Insurance Code, nor does it limit the authority of insurers, health maintenance organizations, or agents to appoint agents, including temporary agents, to market or sell insurance products authorized under the Insurance Code.

Proposed §19.103 requires an insurer, health maintenance organization, or an agent to report in writing any violation of these prohibitions within four calendar days of discovering the violation to the Enforcement Division of the Department. Provisions from the Emergency Rule §19.102(a) - (c) related to the appointment and use of temporary agents have been incorporated in to the more comprehensive requirements in proposed §19.102.

The emergency rule also included §19.104 that set forth a requirement that Medicare Advantage organizations and their subcontractors comply with certain existing Insurance Code agent appointment and termination provisions based on CMS Guidelines. While these provisions would remain effective under the CMS Guidelines and the proposed new CMS guidelines, Congress subsequently on July 15, 2008, adopted MIPPA. MIPPA §103(d) amends the Social Security Act (42 U.S.C. 1395w-21(h)) to set forth the requirement that Medicare Advantage organizations must comply with appointment and termination provisions under state law. Thus, the requirement contained in Emergency Rule §19.104 is no longer necessary and not a part of this proposal because MIPPA now requires Medicare Advantage organizations to comply with agent appointment and termination provisions in the Insurance Code §§4001.201 - 4001.206.

The Department has determined that this proposal will not significantly diminish the available number of insurance agents that are authorized to market Medicare plans. As of July 24, 2008, 168,849 individuals held permanent general life, accident, and health insurance agent licenses, while only 625 individuals held temporary general life, accident, and health insurance agent licenses. Further, between January 1, 2008 and July 24, 2008, the Department had issued a total of 1,566 temporary general life, accident, and health insurance agent licenses at the request of 46 sponsors. From this group, 813 licensing examinations were taken (applicants may take the examination more than once), of which only 359 licensing examinations (approximately 23 percent) were passed. Thus while some temporary agents do succeed in demonstrating their qualifications, even a small number of untrained, unqualified, and unscrupulous insurance agents can take advantage of tens or hundreds of Medicare beneficiaries who rely on these insurance agents to provide them with health coverage that is appropriate for their circumstances.

Based on the foregoing facts, the Department has determined that Medicare beneficiaries faced with the vitally important healthcare choice of choosing a suitable Medicare plan or choosing other coverage are in imminent peril from unqualified and unscrupulous persons engaging in fraudulent marketing of Medicare plans. Additionally, there is imminent peril to the health and welfare of these Medicare beneficiaries. A Medicare beneficiary's unsuitable choice may result in the Medicare beneficiary no longer being able to obtain care from a known physician or provider, confusion as to where and how to seek care, and potentially physical illness or death. Therefore, this proposal is necessary to ensure that Texas Medicare beneficiaries faced with significant and complex healthcare choices are provided with proper and informed guidance from insurance agents holding permanent licenses who have demonstrated their knowledge concerning health insurance coverage and not from untrained, unqualified and potentially unscrupulous individuals engaging in fraudulent marketing of Medicare plans.

Section-by-Section Overview. The following is a section-by-section overview of the proposal.

The proposed subchapter title accurately reflects the subject matter of the subchapter, which relates to Medicare Advantage Plans, Medicare Advantage Prescription Drug Plans, and Prescription Drug Plans.

Proposed §19.101 defines the terms in the proposed subchapter.

Proposed §19.102(a) authorizes permanently licensed general life, accident, and health insurance agents to market Medicare plans. Proposed §19.102(b), consistent with the Insurance Code §4051.053, qualifies permanently licensed general property and casualty insurance agents to market Medicare plans, only to the extent that the Medicare plans are offered by a property and casualty insurer authorized to sell those products in this state. Proposed §19.102(c) provides that no agent holding any other

license type is authorized to market Medicare plans, including individuals holding a temporary general life, accident, and health insurance agent license or a temporary property and casualty insurance agent license. Proposed §19.102(d) prohibits an insurer, health maintenance organization, or insurance agent from assisting or participating in enrolling any individual in a Medicare plan contract that has been marketed by an agent that does not hold a permanent general life, accident and health insurance agent license, or a general property and casualty insurance agent license who is acting for a property and casualty insurer engaged in selling Medicare plans, or unlicensed persons, unless that activity is specifically authorized under federal law and CMS Guidelines to be performed by unlicensed persons.

Finally, proposed §19.103 requires an insurer, health maintenance organization, or insurance agent to report in writing any violation of proposed §19.102 to the Department within four days of discovering the violation.

FISCAL NOTE. Matt Ray, Deputy Commissioner, Licensing Division, has determined that for each year of the first five years the proposal will be in effect, there will be no measurable fiscal impact to state or local governments as a result of the enforcement or administration of the proposal. There will be no measurable effect on local employment or the local economy as a result of the proposal.

PUBLIC BENEFIT/COST NOTE. Mr. Ray also has determined that for each year of the first five years the proposal is in effect, the anticipated public benefit will be protection of the health and welfare of the senior citizens and other Medicare beneficiaries of this state by preventing the fraud and abuse that has been observed in the Texas market regarding Medicare plans. The Department has also determined that the potential costs of compliance with the rule are nominal and limited to the violation-reporting requirement under proposed §19.103. Further, the Department has determined that the public benefits anticipated by the proposed sections outweigh the nominal costs to persons engaged in the marketing of Medicare plans in the state of Texas.

This proposal does not prevent or limit the ability of any Medicare beneficiary from obtaining coverage under a Medicare plan. Further, restricting approximately 625 individual temporary license holders will not significantly diminish the available number of insurance agents that are authorized to market Medicare plans, because there are more than 168,849 individuals licensed as of July 24, 2008, as general life, accident, and health insurance agents. Thus, the proposal will not limit or restrict the number of Medicare plan contracts that may be marketed through licensed agents. The Department's analysis of the potential costs of compliance with the proposed sections is based on the following factors.

Proposed §19.102

Proposed §19.102(a) and (b) designates that Medicare plans may only be marketed through permanently licensed general life, accident, and health insurance agents and permanently licensed general property and casualty insurance agents, to the extent that the Medicare plans are being offered by a property and casualty insurer authorized to sell those products in this state. This proposed section does not place additional licensing requirements on or otherwise affect any individual that is currently permanently licensed as a general life, accident, and health insurance agent or as appropriate, a general property and casualty insurance agent. Such agents may continue to market Medicare plans or be appointed to market Medicare plans under this proposed section. Additionally, this section does not place any additional requirements on an individual or entity seeking to obtain a permanent general life, accident, and health insurance agent license or general property and casualty insurance agent license.

In designating those license types authorized to market Medicare plans under the Insurance Code §4051.051(3) and §4054.051(9) as necessary under federal law and CMS guidelines, proposed §19.102 does not limit the authority of any other agent license type to market any insurance product authorized for that license type under the Insurance Code. Medicare plans are federal benefits. The proposed §19.102 prohibition against insurers, health maintenance organizations, and agents from allowing agents holding other license types or unlicensed persons from assisting or participating in marketing Medicare plans, unless federal law and CMS guidelines authorize that an unlicensed person may perform the activity, is also consistent with the federal law and the CMS Guidelines' requirements that certain marketing activities must be done by licensed agents and with the Commissioner's authority under the Insurance Code to determine which license types are authorized to market Medicare plans. This prohibition does not affect any insurer, health maintenance organization, or agent's authority to market insurance products under the Insurance Code.

The Department has also determined that there will be no additional costs to insurers, health maintenance organizations, or agents that may market Medicare plans and are required to comply with this proposed section. First, the Department has determined that the proposed amendment will not significantly diminish the available number of insurance agents that are currently authorized to market Medicare plans. Thus, agent employment costs should not be affected by a shortage of trained and available agents. Further, the payment of commissions, salaries, and/or other employment or contract benefits are a business decision of the insurer, health maintenance organization, or agent and are not costs required by this proposal. Additionally, for those insurers, health maintenance organizations, or agents that choose to hire "new permanent agents" to market Medicare plans, the manner and cost of educating and training such individuals is a business decision of the insurer, health maintenance organization, or agent. Proposed §19.102 does not create any additional requirement or affect the manner by which an insurer, health maintenance organization, or agent may choose to train and educate its personnel to become licensed and any costs associated with such training is not a result of the proposed section. This proposal does not affect nor assign any cost to any training requirements associated with the marketing of Medicare plans because such plans are federal benefit plans and thus would not be a proper subject for the training of temporary agents under the Insurance Code §4001.160. Medicare plan training requirements are set pursuant to federal law and the CMS marketing guidelines; are applicable to both permanent and temporary agents; and are unaffected by this proposal. Finally, federal law and CMS marketing guidelines establishing requirements as to when and how an unlicensed person may participate in the marketing of Medicare plans are not affected by this proposal, thus any costs associated with such requirements is not a result of this proposal.

Proposed §19.103

Proposed §19.103(d) requires an insurer, health maintenance organization, or agent to report in writing any violation of proposed §19.103 to the Department within four days of discovering

the violation. The requirement is to send the notice by United States mail or by other means acceptable to the Department. Other means may involve electronic methods that may or may not be readily available to all persons. As the mail procedure is available to any person required to comply with this proposal, the Department will consider the costs associated with submitting notice of the violation by mail. The Department estimates that the probable cost to comply with this reporting requirement by mail should be less than $5 per report. The estimated cost is based on the Department's estimate that a member of an insurer, health maintenance organization, or agent's office or administrative staff could compile and submit the required report in less than one quarter of an hour, at the mean salary rate of $16.65 per hour, as set forth in the May 2006 State Occupational Employment and Wage Estimates for Texas published by the U.S. Department of Labor at http://www.bls.gov/oes/current.oes_tx.htm. The remainder of the estimated cost is for paper, an envelope, and first class postage necessary to list the suspected violators and mail that list to the Department. Any other costs incurred in order to comply with the proposed sections result from existing legislation and are not a result of the adoption, enforcement, or administration of the proposal.

ECONOMIC IMPACT STATEMENT AND REGULATORY FLEXIBILITY ANALYSIS FOR SMALL AND MICRO BUSINESSES. The Government Code §2006.002(c) requires that if a proposed rule may have an economic impact on small businesses, state agencies must prepare as part of the rulemaking process an economic impact statement that assesses the potential impact of the proposed rule on small businesses and a regulatory flexibility analysis that considers alternative methods of achieving the purpose of the rule. The Government Code §2006.001(a)(2) defines "small business" as a legal entity, including a corporation, partnership, or sole proprietorship, that is formed for the purpose of making a profit, is independently owned and operated, and has fewer than 100 employees or less than $6 million in annual gross receipts. The Government Code §2006.001(a)(1) defines "micro business" similarly to "small business" but specifies that such a business may not have more than 20 employees. The Government Code §2006.001(a)(1) does not specify a maximum level of gross receipts for a "micro business."

Section 19.102. The Department has determined in the Public Benefit/Cost Note (Cost Note) portion of this proposal that proposed §19.102 does not create any additional cost for persons holding or seeking a permanent general life, accident, and health insurance agent license, or as appropriate a general property and casualty insurance agent license. The proposed section also should not create a shortage of available agents to market Medicare plans for reasons stated in the Cost Note. In addition, §19.102 does not limit the authority of any other license type to sell insurance products under any respective license type. Further, the proposed section does not create any additional requirements or costs for insurers, health maintenance organizations, or agents to market insurance products under the Insurance Code. Rather proposed §19.102 would determine under the Insurance Code §4051.051(3) and §4054.051(9), the agent license types that are authorized to sell Medicare plans, which are federal benefits. MIPPA and the CMS guidelines require Medicare plans to be marketed and sold through state-licensed insurance agents. Therefore, proposed §19.102 does not create an adverse economic impact on licensed agents because it does not create any additional costs for persons holding or seeking a general life, accident, and health insurance agent license or a general property and casualty insurance agent license; does not limit the availability of agents; and does not create costs for nor does it limit the authority of any other license type to sell products under the Insurance Code.

Section 19.103. The Department has determined that fewer than 20 persons may be affected by the proposed §19.103 requirement that insurers, health maintenance organizations, and agents report the use of temporary agents to market Medicare plans to the Department. This number is based on the number of temporary agent violation complaints received following the adoption of the Emergency Rule. As this type of activity is most likely to be discovered by a licensed agent who is also engaged in the marketing of Medicare plans, the Department estimates that each of the 20 persons will either qualify as a small or micro business under the Government Code §2006(a)(1) and (2) by virtue of being either a sole proprietorship or otherwise being associated with an insurance carrier, health maintenance organization, or insurance agency with less than 100 employees. The Department's cost analysis for the violation reporting requirement and resulting estimated costs on a per report basis in the Cost Note portion of this proposal, however, applies equally to all types of businesses.

Other Regulatory Methods

In accordance with the Government Code §2006.002(c-1), the Department has considered other regulatory methods to accomplish the objectives of this proposal that will also minimize any adverse impact resulting from proposed §19.103 on the persons affected by this proposal that qualify as small or micro businesses under the Government Code §2006(a)(1) and (2).

The regulatory objective of proposed §19.103 is to protect the health, safety, and economic welfare of Texas' senior citizens and other Medicare beneficiaries by establishing a violation-reporting requirement for insurers, health maintenance organizations, and agents. Other possible regulatory methods include with respect to proposed §19.103: (i) not adopting or limiting the proposed regulation; and (ii) allowing other alternative methods of delivering the notice.

Not adopting or limiting proposed §19.103. If §19.103 was not adopted, the Department would continue to receive information from agents and others related to violations. However, the reporting requirement, as well as the requirement that the notice be given in four days, places an emphasis on the serious nature which the Department considers this matter to be and, further, prompt notification to the Department is necessary to prevent Medicare beneficiaries from being abused by fraudulent and dishonest practices of unscrupulous agents. Additionally, the Department considered not requiring small and micro businesses to submit the notice. However, agents are the most likely persons to initially discover such violations, and agents are most likely going to either be, or be associated with a small or micro business. Thus, limiting the scope of the requirement would again hinder the ability of the Department to promptly respond to violations. The Department therefore rejected these approaches because this is a serious matter that must be promptly identified when it occurs so that effective and timely regulatory action can be initiated.

Allowing alternative methods of delivery. The Department anticipates that costs resulting from the proposed requirement in §19.103 are attributable to preparing and delivering the notice. The Department analyzed the cost of mailing a report to the Department in the Cost Note because that option is available to substantially everyone in the state. The Department does, however,

believe that the preparation and mailing cost may be reduced or eliminated through alternative methods of delivering the notice. Thus, proposed §19.103 provides that the notice may be made by alternative methods acceptable to the Department. These methods, including electronic notices, are not expressly stated in the proposal so as to allow for regulatory flexibility. These methods may be posted on the Department's website in the future and these methods of notice delivery will be potentially available to all persons. It is possible, however, that a person required to comply with the notice would not be able to comply with an electronic notice method either due to location or lack of necessary equipment or software. Thus an electronic method of delivery was not required. Therefore, the Department has included the ability to utilize alternative delivery methods in the proposal, but is continuing to list mail as the default means of notice because it should be available to any person required to comply with proposed §19.103 and the cost is nominal.

TAKINGS IMPACT ASSESSMENT. The Department has determined that no private real property interests are affected by this proposal and that this proposal does not restrict or limit an owner's right to property that would otherwise exist in the absence of government action and, therefore, does not constitute a taking or require a takings impact assessment under the Government Code §2007.043.

REQUEST FOR PUBLIC COMMENT. To be considered, written comments on the proposal must be submitted no later than 5:00 p.m. on Monday, October 13, 2008, to Gene C. Jarmon, General Counsel and Chief Clerk, Mail Code 113-2A, Texas Department of Insurance, P.O. Box 149104, Austin, Texas 78714-9104. An additional copy of the comment must be simultaneously submitted to Matt Ray, Deputy Commissioner for the Licensing Division, Mail Code 107-1A, Texas Department of Insurance, P.O. Box 149104, Austin, Texas 78714-9104. Any request for a public hearing should be submitted separately to the Office of the Chief Clerk before the close of the public comment period. If a hearing is held, written and oral comments presented at the hearing will be considered.

STATUTORY AUTHORITY. The new sections are proposed under the Insurance Code §§4001.003, 4001.005, 4001.105, 4001.106, 4001.152 - 4001.156, 4051.051, 4051.053, 4054.051 - 4056.054, and 36.001. Section 4001.003(8) provides a definition of person for use in the Insurance Code Title 13, which concerns insurance agent licensing. Section 4001.005 authorizes the Commissioner to adopt rules necessary to implement the Insurance Code Title 13 and to meet the minimum requirements of federal law, including regulations. Section 4001.105 enumerates the requirements that must be met in order for the Department to issue an insurance agent license to an individual. Section 4001.106 enumerates the requirements that must be met in order for the Department to issue an insurance agent license to a corporation or partnership. Section 4001.152 states that an applicant is not required to pass a written examination to obtain a temporary agent license. Section 4001.153 enumerates the requirements that must be met in order for the Department to issue a temporary insurance agent license to an applicant. Section 4001.154 provides authority for an applicant to begin to act as a temporary insurance agent if a temporary license is not received from the Department before the eighth day after the date the application, nonrefundable fee, and certificate are delivered or mailed to the Department and the appropriate agent, insurer, or health maintenance organization has not been notified that the application is denied. Section 4001.155 provides that a temporary insurance agent license is valid for a period of 90 days after the date of issuance. Section 4001.156 provides that a temporary insurance agent license may not be issued to or renewed by the same person more than once in a consecutive six-month period and that a temporary insurance agent license may not be issued to a person who does not intend to apply for a license to sell insurance or memberships to the general public. Section 4051.051(3) mandates that a person hold a general property and casualty license if the person acts as an insurance agent who writes any other kind of insurance than that described in §4051.051 as required by the Commissioner for the protection of the insurance consumers of this state. Section 4051.053 authorizes a person holding a general property and casualty insurance agent license to write health and accident insurance for a property and casualty insurer authorized to sell those insurance products in this state. Section 4054.051(9) mandates that a person hold a general life, accident, and health insurance license if the person acts as an insurance agent who writes any other kind of insurance than that described in §4051.051 as required by the Commissioner for the protection of the insurance consumers of this state. Section 4056.052 enumerates the requirements that must be met in order for the Department to issue a nonresident insurance agent license to an applicant who holds an insurance agent license in another state. Section 4056.053 enumerates the requirements that must be met in order for the Department to issue a nonresident insurance agent license to an applicant who does not hold an insurance agent license in another state. Section 4056.054 enumerates the requirements that must be met in order for the Department to issue a nonresident insurance agent license to a corporation or partnership. Section 36.001 provides that the Commissioner of Insurance may adopt any rules necessary and appropriate to implement the powers and duties of the Texas Department of Insurance under the Insurance Code and other laws of the state.

CROSS REFERENCE TO STATUTE. The following statutes are affected by this proposal: Insurance Code §§4001.003, 4001.005, 4001.105, 4001.106, 4001.152 - 4001.156, 4051.051, 4051.053, and 4054.051 - 4056.054.

§19.101. Definitions.

The following words and terms when used in this subchapter shall have the following meanings unless the context clearly indicates otherwise.

(1) CMS--Centers for Medicare and Medicaid Services.

(2) CMS marketing guidelines--CMS' published marketing guidelines for use by Medicare Advantage Plans, Medicare Advantage Prescription Drug Plans, Prescription Drug Plans and 1876 Cost Plans, as revised July 25, 2006, and inclusive of all subsequent revisions.

(3) Department--Texas Department of Insurance.

(4) Marketing--Soliciting and/or selling.

(5) Medicare Plans--Medicare Advantage Plans, Medicare Advantage Prescription Drug Plans, and Prescription Drug Plans as described in the CMS marketing guidelines.

(6) Permanent license--A license issued to a person satisfying all the requirements of the Insurance Code §§4001.105, 4001.106, 4056.052, 4056.053, or 4056.054. The term does not include a temporary license issued under the Insurance Code §§4001.151 - 4001.154.

(7) Person--An individual, partnership, corporation, or depository institution as defined in the Insurance Code §4001.003(8).

§19.102. Agent Authority to Market Medicare Advantage Plans, Medicare Advantage Prescription Drug Plans, and Medicare Prescription Drug Plans.

(a) Persons holding a current permanent general life, accident, and health insurance license under the Insurance Code §4054.051 are authorized to act as marketing representatives to market Medicare plans pursuant to federal law, regulations and CMS marketing guidelines.

(b) In accord with the Insurance Code §4051.053, persons holding a current permanent general property and casualty insurance agent license under the Insurance Code §4051.051 are qualified to act as marketing representatives to market Medicare plans pursuant to federal law, regulations and CMS marketing guidelines, only to the extent that the Medicare plans are offered by a property and casualty insurer authorized to sell those products in this state.

(c) Unless qualifying under subsections (a) or (b) of this section, department licensees, including individuals holding a temporary general life accident and health insurance agent license or a temporary general property and casualty insurance agent license, are not qualified to act and are prohibited from acting as marketing representatives to market Medicare plans.

(d) Except for activities that are specifically authorized under federal law and CMS marketing guidelines to be performed by unlicensed persons, an insurer, health maintenance organization, or insurance agent is prohibited from assisting or participating in enrolling any individual in a Medicare plan contract marketed by an:

(1) agent that does not hold either:

(A) a permanent general life, accident and health insurance agent license; or

(B) a general property and casualty insurance agent licenses who are acting for a property and casualty insurer engaged in selling Medicare plans; or

(2) unlicensed person.

§19.103. Reporting Requirement.

An insurer, health maintenance organization, or insurance agent is required to report in writing any violation of §19.102 of this subchapter (relating to Agent Authority to Market Medicare Advantage Plans, Medicare Advantage Prescription Drug Plans, and Medicare Prescription Drug Plans) within four calendar days of discovering the violation by first class United States mail to the Enforcement Division, Compliance Intake Unit, Mail Code 110-1A, Texas Department of Insurance, P.O. Box 149104, Austin, Texas 78714-9104 or by other method acceptable to the department.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on August 29, 2008.

TRD-200804700
Gene C. Jarmon
General Counsel and Chief Clerk
Texas Department of Insurance
Earliest possible date of adoption: October 12, 2008
For further information, please call: (512) 463-6327

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TITLE 37. PUBLIC SAFETY AND CORRECTIONS

PART 13. TEXAS COMMISSION ON FIRE PROTECTION

CHAPTER 461. GENERAL ADMINISTRATION

37 TAC §461.4

The Texas Commission on Fire Protection (the Commission) proposes an amendment to Chapter 461, General Administration, §461.4, concerning Definitions. The proposed rule change accomplishes three purposes. In §461.4(5), a reference is corrected from Insurance Service Organization to Insurance Services Office. In §461.4(6) the definition of municipal fire department is changed so that the definition of a municipal fire department from one that has its primary fire station located in an incorporated city to one that has its primary response area located in an incorporated city. The purpose of the change is to reflect the current-day reality that many previously rural fire departments have their primary fire station located within the boundaries of incorporated cities. The current definition created inconsistencies and confusion in the funds allocation process. The proposed change in the definition will add clarity to the process. Finally in §461.4(7), the use of the initials NFA as the defined term rather than the term National Fire Academy is more consistent with the definitions of acronyms for other entities and agencies that are listed in this section.

Ms. Ana Munoz, Director of Support Services, has determined that for the first five-year period the proposed amendment is in effect there will be no fiscal impact on state or local governments.

Ms. Munoz has also determined that for each year of the first five years the proposed amendment is in effect, there will be no additional costs of compliance for small or large businesses or individuals that are required to comply with this proposed amendment.

Comments regarding this proposed amendment may be submitted, in writing, within 30 days following the publication of this notice in the *Texas Register* to Gary L. Warren, Sr., Executive Director, Texas Commission on Fire Protection, P.O. Box 2286, Austin, Texas 78768-2286 or e-mailed to info@tcfp.state.tx.us. Comments will be reviewed and discussed at a future Commission meeting.

This amendment is proposed under Subchapter G of Chapter 419, Texas Government Code, which provides for monetary awards to applicants within the Texas fire service.

Cross reference to statute: Texas Government Code, §419.001.

§461.4. Definitions.

The following words and terms, when used in Chapters 461, 463, and 465 of this title, shall have the following meanings, unless the context clearly indicates otherwise.

(1) - (4) (No change.)

(5) ISO--The Insurance Services Office [~~Service Organization~~].

(6) Municipal fire department--A fire department which has its primary response area [~~fire station~~] located within an incorporated city.

(7) NFA--National Fire Academy--The federally funded training facility in Emmitsburg, Maryland.

(8) - (11) (No change.)

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on August 26, 2008.

TRD-200804638
Gary L. Warren, Sr.
Executive Director
Texas Commission on Fire Protection
Earliest possible date of adoption: October 12, 2008
For further information, please call: (512) 936-3838

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CHAPTER 463. APPLICATION CRITERIA

37 TAC §463.2

The Texas Commission on Fire Protection (the Commission) proposes amendments to Chapter 463, §463.2, concerning Limitations on Loans, Scholarships and Grants. Proposed changes to §463.2(c), (d), (e), and (f) would make the treatment of the capitalization of the word "Commission" more consistent throughout the Commission's rules. An additional change to §463.2(d) would state that priority consideration will be given to certain grants and scholarships rather than there being a limitation.

Ana Munoz, Director of Support Services, has determined that for the first five-year period the proposed amendments are in effect there will be no fiscal impact on state or local governments.

Ms. Munoz has also determined that for each year of the first five years the proposed amendments are in effect, an expected public benefit of enforcing the amendments is clarity of the application of the rules. There are no additional costs of compliance for small or large businesses or individuals that are required to comply with this proposed amendments.

Comments regarding this proposed amendments may be submitted, in writing, within 30 days following the publication of this notice in the *Texas Register* to Gary L. Warren, Sr., Executive Director, Texas Commission on Fire Protection, P.O. Box 2286, Austin, Texas 78768-2286 or e-mailed to info@tcfp.state.tx.us. Comments will be reviewed and discussed at a future Commission meeting.

The amendments are proposed under Chapter 419, Subchapter G of the Texas Government Code, which provides for the approval of monetary awards to applicants within the Texas fire service.

Cross reference to statute: Texas Government Code, §419.060 and §419.061.

§463.2. Limitations on Loans, Scholarships[~~,~~] and Grants.

(a) - (b) (No change.)

(c) Specific loan terms and interest rates within the parameters of subsection (b) of this section will be established at each regularly scheduled meeting of the Commission [~~commission~~]. It is provided, however, that the term and interest rate applicable to an application will be the term and interest rate in effect at the time of receipt of the application unless the most current Commission-approved [~~commission-approved~~] interest rate is lower than that in effect at the time of receipt of the application. In that case, the lower interest rate will be applicable.

(d) The FAAC shall give priority consideration to requests [~~Grants and scholarships shall generally be limited to awards~~] for training, education, personal protective clothing, and self-contained breathing apparatus to enhance firefighter safety. Grants for equipment and facilities will not be awarded if, in the opinion of the Commission [~~commission~~], the applicant has the ability to repay a loan for the amount of assistance being requested.

(e) Applications from fire departments and organizations which are submitted collectively in order to request funds for a single project which exceeds the statutory amount of funds allowed to be awarded to any single applicant will not be considered for funding by the Commission [~~commission~~].

(f) Loans and grants must be approved by the Commission [~~commission~~] prior to the purchase of eligible equipment or facilities.

(g) (No change.)

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on August 26, 2008.

TRD-200804639
Gary L. Warren, Sr.
Executive Director
Texas Commission on Fire Protection
Earliest possible date of adoption: October 12, 2008
For further information, please call: (512) 936-3838

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37 TAC §463.3

The Texas Commission on Fire Protection (the Commission) proposes amendments to Chapter 463, Application Criteria, §463.3, concerning Application Form. The purpose of the proposed change to §463.3(a)(4) is to provide more clarification regarding the category of fire departments being considered for loans and is complementary to the proposed change to §461.4(6) that is being published for comment simultaneously with this proposed change. The change to §463.3(25) is to ensure that eligibility is determined by fire departments' involvement in fire suppression and not by emergency medical responses since the equipment that could be purchased through any loaned funds would pertain to fire suppression activities.

Ms. Ana Munoz, Director of Support Services, has determined that for the first five-year period the proposed amendment is in effect there will be no fiscal impact on state or local governments.

Ms. Munoz has also determined that for each year of the first five years the proposed amendment is in effect, an expected public benefit of enforcing the amendments is consistency of application of criteria to prospective applicants for loans. There are no additional costs of compliance for small or large businesses or individuals that are required to comply with this proposed amendment.

Comments regarding this proposed amendment may be submitted, in writing, within 30 days following the publication of this notice in the *Texas Register* to Gary L. Warren, Sr., Executive Director, Texas Commission on Fire Protection, P.O. Box 2286, Austin, Texas 78768-2286 or e-mailed to info@tcfp.state.tx.us. Comments will be reviewed and discussed at a future Commission meeting.

This amendment is proposed under Subchapter G of Chapter 419, Texas Government Code, which provides for the approval of monetary awards within the Texas fire service.

Cross reference to statute: Texas Government Code, §419.001.

§463.3. Application Form.

(a) In addition to statutory requirements, the following information will be collected from every applicant to identify the organization and to compile comparative selection criteria established in §463.4 of this title (relating to Competitive Needs Criteria) and loan eligibility in §463.5 of this title (relating to Criteria for Eligibility for Loans):

(1) - (3) (No change.)

(4) whether the fire department is a municipal fire department or serves a rural or unincorporated area [based within an incorporated city limits or in an unincorporated area];

(5) - (24) (No change.)

(25) three-year response activity for structure, vehicle, ground cover, and other fires [and EMS and rescue response and assists];

(26) - (28) (No change.)

(b) (No change.)

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on August 26, 2008.

TRD-200804640
Gary L. Warren, Sr.
Executive Director
Texas Commission on Fire Protection
Earliest possible date of adoption: October 12, 2008
For further information, please call: (512) 936-3838

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37 TAC §463.4

The Texas Commission on Fire Protection (the Commission) proposes amendments to Chapter 463, Application Criteria, §463.4, concerning Competitive Needs Criteria. The purpose of the proposed division of current §463.4(5) into proposed §463.4(5) and (6) and the deletion and addition of certain language to the portion of current §463.4(a)(5) that is moved into the proposed new §435.4(a)(6) is to emphasize and ensure an understanding that the competitive need criteria of reporting incidents to the TEXFIRS system is a mandatory requirement for eligibility and that the adoption and utilization of the National Incident Management System (NIMS) in accordance with the dictates of the Governor's Emergency Management requirements is a separate and additional requirement for eligibility. Additional changes primarily are editorial in nature. The capitalization of the word Commission is changed for consistency.

Ms. Ana Munoz, Director of Support Services, has determined that for the first five-year period the proposed amendment is in effect there will be no fiscal impact on state or local governments.

Ms. Munoz has also determined that for each year of the first five years the proposed amendment is in effect, an expected public benefit of enforcing the amendments is clarity of need criteria. There are no additional costs of compliance for small or large businesses or individuals that are required to comply with this proposed amendment.

Comments regarding this proposed amendment may be submitted, in writing, within 30 days following the publication of this notice in the *Texas Register* to Gary L. Warren, Sr., Executive Director, Texas Commission on Fire Protection, P.O. Box 2286, Austin, Texas 78768-2286 or e-mailed to info@tcfp.state.tx.us. Comments will be reviewed and discussed at a future Commission meeting.

This amendment is proposed under Subchapter G of Chapter 419, Texas Government Code, which provides for the approval of monetary awards to applicants within the Texas fire service.

Cross reference to statute: Texas Government Code, §419.060 and §419.061.

§463.4. Competitive Needs Criteria.

(a) All applications must meet the following minimum standards:[.]

(1) - (4) (No change.)

(5) Applicants must routinely and consistently report incidents to the TEXFIRS system[, and adopt and utilize NIMS in accordance with the Federal Emergency Management Agency (FEMA) timeline. The applicant shall furnish sufficient proof of the required reporting at the time the application is submitted].

(6) Applicants must have adopted and utilized National Incident Management System (NIMS) according to the Governor's Division of Emergency Management requirements.

(7) [(6)] Except for applicants for scholarships, all applicants must participate in a training certification program approved by the Texas Commission on Fire Protection at the time of application. Participation in a training certification program means:

(A) participation by a majority of a department's members in an approved training program as identified in §465.3 of this title (relating to Education and Training Standards); or

(B) current certification of the department as a Commission-approved [commission approved] training facility that conducts at least 48 hours of drills each calendar year attended by a majority of members; or

(C) current certification by the Commission [commission] of at least 10 members with current continuing education.

(b) (No change.)

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on August 26, 2008.

TRD-200804637
Gary L. Warren, Sr.
Executive Director
Texas Commission on Fire Protection
Earliest possible date of adoption: October 12, 2008
For further information, please call: (512) 936-3838

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CHAPTER 465. EQUIPMENT, FACILITIES, AND TRAINING STANDARDS

37 TAC §465.1

The Texas Commission on Fire Protection (the Commission) proposes an amendment to Chapter 465, Equipment, Facilities, and Training Standards, §465.1, concerning Equipment Standards.

The purpose of the proposed change to §465.1(a) is to correct the name of the Insurance Service Organization to Insurance Services Office. The proposed change to §465.1(c) is to eliminate a transportation equipment exception to §465.1(d) which will ensure that all transportation equipment purchased will comply with the applicable National Fire Protection Association, Underwriters Laboratory, or Insurance Services Office standard.

Ms. Ana Munoz, Director of Support Services, has determined that for the first five-year period the proposed amendment is in effect there will be no fiscal impact on state or local governments.

Ms. Munoz has also determined that for each year of the first five years the proposed amendment is in effect, there are no additional costs of compliance for small or large businesses or individuals that are required to comply with this proposed amendment.

Comments regarding this proposed amendment may be submitted, in writing, within 30 days following the publication of this notice in the *Texas Register* to Gary L. Warren, Sr., Executive Director, Texas Commission on Fire Protection, P.O. Box 2286, Austin, Texas 78768-2286 or e-mailed to info@tcfp.state.tx.us. Comments will be reviewed and discussed at a future Commission meeting.

This amendment is proposed under Subchapter G of Chapter 419, Texas Government Code, which provides for the grant of monetary awards within the Texas fire service.

Cross reference to statute: Texas Government Code, §419.001.

§465.1. Equipment Standards.

(a) All equipment purchased, either new or used, must meet or exceed National Fire Protection Association, Underwriters Laboratory, or Insurance Services Office [~~Service Organization~~] standards.

(b) (No change.)

(c) [~~Transportation equipment shall be exempt from subsection (a) of this section but subject to commission approval.~~] Transportation equipment must be of a type customarily and commonly used in responding to fires or related to fire fighting activities (e.g., pumpers, ladder trucks, booster and brush vehicles, etc.).

(d) Equipment may not be acquired with Fire Department Emergency Program funds which have not been expressly approved for purchase by the Commission [~~commission~~].

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on August 26, 2008.

TRD-200804641
Gary L. Warren, Sr.
Executive Director
Texas Commission on Fire Protection
Earliest possible date of adoption: October 12, 2008
For further information, please call: (512) 936-3838

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TITLE 43. TRANSPORTATION

PART 1. TEXAS DEPARTMENT OF TRANSPORTATION

CHAPTER 1. MANAGEMENT

SUBCHAPTER I. ELECTRONIC SIGNATURES

43 TAC §1.700

The Texas Department of Transportation (department) proposes new Subchapter I, Electronic Signatures, §1.700, concerning Digital Certificates.

EXPLANATION OF PROPOSED NEW SECTION

To facilitate the digital signing of electronic documents, the department has elected to use public key/private key infrastructure technology as outlined in Appendix 1(2), entitled "Public/Private Key (Asymmetric) Cryptography - Digital Signatures" of the "Guidelines for the Management of Electronic Transactions and Signed Records," prepared by the Uniform Electronic Transactions Act Task Force of the Department of Information Resources and the Texas State Library and Archives Commission. As a result, the department, acting as a registration authority, will approve the issuance of digital certificates to individuals by a contracted certification authority that has been approved by the Department of Information Resources under 1 TAC Part 10, Chapter 203, Subchapter B, §203.25, concerning Acceptable PKI (Public Key Infrastructure) Service Providers.

New §1.700, Digital Certificates, has been added to govern the issuance of digital certificates. Subsection (a), Purpose, prescribes the purpose of the section to govern the issuance, use, and revocation of digital certificates issued by the department, and provides that 1 TAC Part 10, Chapter 203, Subchapter B, governs over any conflict with the section.

New §1.700(b), Definitions, provides definitions.

New §1.700(c), Program authorization, explains that digital certifications will be phased into the department based on whether the industries and organizations involved in particular programs are already using that technology and the frequency of document submission. Since the department's programs are so varied in subject matter and each program works with a different set of interested stakeholders, each division director will decide whether digital signatures is appropriate for that division's programs.

New §1.700(d), Application and issuance of digital certificate, prescribes the procedures for application, including identification, and issuance of a digital certificate to an individual.

New §1.700(e), Refusal to issue a digital certificate, provides that the department will not issue a digital certificate if the identity of the individual to whom the certificate is to be issued or the identity of the individual requesting the certificate cannot be established or if the business entity on whose behalf the request is allegedly being made does not authorize its issuance.

New §1.700(f), Responsibilities of certificate holder, requires the certificate holder to maintain the security of the digital certificate, use the certificate solely for the purpose for which it was issued, and renew the certificate in a timely manner.

New §1.700(g), Responsibilities of business entity, provides that a business entity is responsible for determining the individual who may request and be issued a certificate and requesting revocation of a certificate when necessary.

New §1.700(h), Revocation of certificate, authorizes the department to revoke a digital certificate when requested by an individual authorized to act on behalf of the business entity, for suspension or debarment, or if the department has reason to believe the digital certificate would present a security risk.

New §1.700(i), Use of digital certificate, provides that a digital signature must be used for digitally signing electronic documents, the digital signature is binding on the certificate holder and the represented business entity, and the digital certificate may be used to identify the certificate holder when granting or verifying access to secure computer systems.

New §1.700(j), Forms, authorizes the department to prescribe forms to request, modify, or revoke a digital certificate.

FISCAL NOTE

James Bass, Chief Financial Officer, has determined that for each of the first five years the proposed new section is in effect, there will be a fiscal impact to state government. The cost to the department for issuing the certificates is $7.50 for each certificate. The current annual contract maximum with Verisign, the vendor that provides the digital certification, is $52,500.00. That contract is renewable on an annual basis.

Implementation of the use of digital certificates has the potential for substantial savings to the department by enabling the use of electronic commerce systems, such as electronic bidding, which will reduce or eliminate the number of nonresponsive bids, incomplete bids, and other contractor errors. There will be no fiscal implications for local governments as a result of enforcing or administering the new section as the department will pay the digital certification cost for local governments that use the electronic system.

Ed Serna, Assistant Executive Director, Support Operations, has certified that there will be no significant impact on local economies or overall employment as a result of enforcing or administering the new section.

PUBLIC BENEFIT AND COST

Mr. Serna has also determined that for each year of the first five years the sections are in effect, the public benefit anticipated as a result of enforcing or administering the new section will be a more efficient and effective process for the submittal of solicitation documentation. There are no anticipated economic costs for persons required to comply with the sections as proposed. There will be no adverse economic effect on small businesses.

SUBMITTAL OF COMMENTS

Written comments on proposed new §1.700 may be submitted to Ed Serna, Assistant Executive Director, Support Operations, Texas Department of Transportation, 125 East 11th Street, Austin, Texas 78701-2483. The deadline for receipt of comments is 5:00 p.m. on October 13, 2008.

STATUTORY AUTHORITY

The new section is proposed under Transportation Code, §201.101, which provides the Texas Transportation Commission with the authority to establish rules for the conduct of the work of the department.

CROSS REFERENCE TO STATUTE

Government Code, §2054.060 and Business and Commerce Code, §43.017.

§1.700. Digital Certificates.

(a) Purpose. This section prescribes the requirements that govern the issuance, use, and revocation of digital certificates issued by the department for electronic commerce in eligible department programs. Texas Administrative Code, Title 1, Part 10, Chapter 203, Subchapter B governs to the extent of any conflict between that subchapter and a provision of this section.

(b) Definitions. The following words and terms, when used in this section, shall have the following meanings, unless the context clearly indicates otherwise.

(1) Business entity--An entity recognized by law through which business is conducted with the department, including a sole proprietorship, partnership, limited liability company, corporation, joint venture, educational institution, governmental agency, or non-profit organization.

(2) Certificate holder--An individual to whom a digital certificate is issued.

(3) Digital certificate--A certificate, as defined in Title 1, Texas Administrative Code, Chapter 203, Subchapter A, §203.1 (relating to Key Terms and Technologies for Electronic Transactions and Signed Records), issued by the department for purposes of electronic commerce.

(4) Digital signature--An electronic identifier assigned in a digital certificate and intended by the person using it to have the same force and effect as the use of a manual signature for signing an electronic document.

(5) Division director--The chief administrative officer of a division or office of the department.

(c) Program authorization. A division director may authorize the use of digital signatures for a particular program based on whether the applicable industries or organizations are using such technology, the frequency of document submission, and the appropriateness for the program. The solicitation documentation for eligible programs will include the information that digital signatures may be used.

(d) Application and issuance of digital certificate.

(1) A request for a digital certificate must be in writing and must be signed by the individual authorized by the business entity to request a digital certificate.

(2) The department may request information necessary to verify the identity of the individual requestor or the business entity that has authorized the request. To verify identity under this paragraph a person must present:

(A) a Texas driver's license or identification certificate with a photograph that is within two years after its expiration date;

(B) an unexpired United States passport;

(C) a United States citizenship (naturalization) certificate with identifiable photograph;

(D) an unexpired United States Bureau of Citizenship and Immigration Services document that was issued for a period of at least one year, that is valid for not less than six months from the date it is presented to the department with a completed application, and that contains verifiable data and an identifiable photograph;

(E) an unexpired United States military identification card for active duty, reserve, or retired personnel with an identifiable photograph; or

(F) a foreign passport with a valid or expired visa issued by the United States Department of State with an unexpired United States Bureau of Citizenship and Immigration Services Form I-94:

(i) that was issued for a period of at least one year, is marked valid for a fixed duration, and is valid for not less than six

months from the date it is presented to the department with a completed application; or

(ii) that is marked valid for the duration of the person's stay and is accompanied by appropriate documentation.

(3) The department may take actions necessary to confirm that the individual who signed the request is authorized to act on behalf of the business entity, including requiring the individual requestor or the person authorizing the request to personally appear at the department office responsible for the issuing of the certificate.

(4) The department will issue a digital certificate only to an individual. Information identifying the business entity that authorized the issuance of the certificate may be embedded in the digital certificate.

(e) Refusal to issue a digital certificate. The department will not issue a digital certificate if the identity of the individual to whom the certificate is to be issued or the identity of the individual requesting the certificate on behalf of a business entity cannot be established. The department will not issue a digital certificate if the business entity on whose behalf the request is allegedly being made does not authorize its issuance.

(f) Responsibilities of certificate holder. A certificate holder must:

(1) maintain the security of the digital certificate;

(2) use the certificate solely for the purpose for which it was issued; and

(3) renew the certificate in a timely manner, if continued use is intended.

(g) Responsibilities of business entity. A business entity is responsible for:

(1) determining the individual who may request a certificate for the business entity;

(2) determining the individual to whom a certificate is to be issued; and

(3) requesting within a reasonable time the revocation of its certificate if the security of the certificate has been compromised or if the business entity is changing its certificate holder.

(h) Revocation of certificate. The department will revoke a digital certificate:

(1) on receipt of a written request for its revocation signed by an individual authorized to act on behalf of the business entity for which it was issued;

(2) for suspension or debarment of the individual or business entity; or

(3) if the department has reason to believe that continued use of the digital certificate would present a security risk.

(i) Use of digital certificate.

(1) A digital signature assigned in a digital certificate issued by the department must be used for digitally signing electronic documents filed with the department and only such a signature may be used for that purpose. The use of the digital signature is binding on the individual to whom the certificate was issued and the represented business entity, as if the document were signed manually.

(2) The department may use the digital certificate to identify the certificate holder when granting or verifying access to secure computer systems used for electronic commerce.

(j) Forms. The department may prescribe forms to request, modify, or revoke a digital certificate.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on August 29, 2008.

TRD-200804684
Bob Jackson
General Counsel
Texas Department of Transportation
Earliest possible date of adoption: October 12, 2008
For further information, please call: (512) 463-8683

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CHAPTER 4. EMPLOYMENT PRACTICES
SUBCHAPTER D. SUBSTANCE ABUSE PROGRAM

43 TAC §§4.31, 4.34, 4.37, 4.39, 4.42 - 4.44

The Texas Department of Transportation (department) proposes amendments to §4.31, Definitions, §4.34, Illegal Drugs, §4.37, Test Results, §4.39, Refusal to Test, §4.42, Recurrence of Substance Abuse, §4.43, Employees Who Drive for the Department, and §4.44, Commercial Drivers, Safety-Sensitive Employees, and Vessel Crewmembers, all concerning the department's substance abuse program.

EXPLANATION OF PROPOSED AMENDMENTS

The proposed amendments are necessary to implement recent amendments to the United States Coast Guard regulations at 46 Code of Federal Regulations (C.F.R.) Parts 4 and 16 for employees who are vessel crewmembers; to reflect changes in the federal Fair Labor Standards Act; to reflect recent amendments to the United States Department of Transportation regulations at 49 C.F.R. Part 40, which added additional activities that may be considered a refusal to test; to better reflect current practice; to clarify existing language; and to update standards to prevent the evasion of the intent of the rules. The federal Fair Labor Standards Act has been amended to allow for the flexibility to suspend an employee for less than a full work week, so references to the requirement of five-day suspension without pay are decreased to a three-day suspension without pay for all disciplinary issues. References to C.F.R. and United States Code (U.S.C.) are updated throughout to reflect proper legal formatting.

Amendments to §4.31 change the term serious marine "accident" to serious marine "incident" and change "ferry" to "self-propelled vessel" to correspond to the changes in the federal regulations 46 C.F.R. Part 4.

Amendments to §4.34 add conspiracy to the list of drug-related criminal offenses that will result in termination, to clarify that any type of involvement in the sale, distribution, transportation, or manufacture of illegal drugs is prohibited.

Changes to §4.34(c) decrease the five day suspension without pay to a three day suspension without pay for all disciplinary issues associated with policy violations that require disciplinary action. The federal Fair Labor Standards Act has been amended to allow for the flexibility to suspend an employee for less than a full work week.

Amendments to §4.37 add that project and temporary employees will be terminated from the department for a refusal to test or a positive drug test result or an alcohol test result of 0.04 or greater. This will deter temporary employees from violating the substance abuse policy and eliminate the undue hardship imposed upon supervisors and co-workers because of an employee's absence after being referred for treatment. To bring the rules in line with current department policy, the reference to the typical length of initial probation was omitted in order to include those employees who have their initial probationary period extended for 90 days.

Amendments to §4.39 reflect changes to the United States Department of Transportation regulations at 49 C.F.R. Part 40, which added additional activities that may be considered a refusal to test.

Amendments to §4.42(a) clarify the circumstances under which the department will terminate an employee for recurrence of substance abuse.

Amendments to §4.43(b) delete the requirement to maintain a list of employees who drive for the department because under current policy and practice, all employees are considered to be employees who drive for the department.

Amendments to §4.43(c) add the phrase "other than operating a commercial motor vehicle" to clarify that an occupational license will be accepted if it allows the employee to perform driving duties for the department as long as the driving does not require a commercial license. Transportation Code, §521.242 prohibits the issuance of an occupational license to replace a commercial driver's license.

Changes to §4.43(d) and (e) decrease the five day suspension without pay to a three day suspension without pay for all disciplinary issues associated with policy violations that require disciplinary action. The federal Fair Labor Standards Act has been amended to allow for the flexibility to suspend an employee for less than a full work week.

Amendments to §4.44 change serious marine "accident" to serious marine "incident" and permit the department to delay conducting a drug or alcohol test if necessary to address safety concerns following a serious marine incident. These amendments reflect changes in the federal regulations, 46 C.F.R. Part 4. To comply with amendments to 46 C.F.R. Part 16, §4.44 is also amended to require that the provisions of 46 C.F.R. Part 5 be satisfied prior to allowing an employee to perform vessel crewmember duties.

FISCAL NOTE

James Bass, Chief Financial Officer, has determined that for each of the first five years the amendments as proposed are in effect, there will be no fiscal implications for state or local governments as a result of enforcing or administering the amendments.

Debbie Moore, Interim Director, Human Resources Division, has certified that there will be no significant impact on local economies or overall employment as a result of enforcing or administering the amendments.

PUBLIC BENEFIT AND COST

Ms. Moore has also determined that for each year of the first five years the sections are in effect, the public benefit anticipated as a result of enforcing or administering the amendments will be improved administration of the program. There are no anticipated economic costs for persons required to comply with the sections as proposed. There will be no adverse economic effect on small businesses.

SUBMITTAL OF COMMENTS

Written comments on the proposed amendments to §4.31, §4.34, §4.37, §4.39, and §§4.42-4.44 may be submitted to Debbie Moore, Interim Director, Human Resources Division, Texas Department of Transportation, 125 East 11th Street, Austin, Texas 78701-2483. The deadline for receipt of comments is 5:00 p.m. on October 13, 2008.

STATUTORY AUTHORITY

The amendments are proposed under Transportation Code, §201.101, which provides the Texas Transportation Commission with the authority to establish rules for the conduct of the work of the department.

CROSS REFERENCE TO STATUTE

Transportation Code, §201.101 and §521.242.

§4.31. Definitions.

The following words and terms, when used in this subchapter, shall have the following meanings, unless the context clearly indicates otherwise.

(1) Alcohol--The intoxicating agent in beverage alcohol, ethyl alcohol, or other low molecular weight alcohols including methyl and isopropyl alcohol.

(2) Alcohol test result--The alcohol in a volume of breath expressed in terms of grams of alcohol per 210 liters of breath as indicated by a breath test.

(3) Alcohol- or drug-related driving offense--A conviction or deferred adjudication for any offense involving the driving of a vehicle, whether on-duty or off-duty, while under the influence of alcohol or drugs or while intoxicated.

(4) Commercial driver--An employee who operates a commercial motor vehicle for the department, regardless of the frequency.

(5) Commercial motor vehicle--A motor vehicle or combination of vehicles used to transport passengers or property if it:

(A) has a gross combination weight rating of 26,001 or more pounds inclusive of a towed unit with a gross vehicle weight rating of more than 10,000 pounds;

(B) has a gross vehicle weight rating of 26,001 or more pounds;

(C) is designed to transport 16 or more passengers, including the commercial driver; or

(D) is of any size and is used in the transportation of materials that are considered hazardous under the Hazardous Materials Transportation Act, 49 U.S.C. [~~USC~~] §5103(b), and that require the motor vehicle to be placarded under the Hazardous Materials Regulations, 49 C.F.R. [~~CFR~~] Part 172, Subpart F.

(6) Completion of treatment--Compliance with all EAP treatment recommendations and requirements, passing all required drug and alcohol tests, and finishing all treatment as prescribed by the EAP counselor or by the treatment program's staff physician.

(7) Critical duties--Driving, commercial driving, performing safety-sensitive activities, performing vessel crewmember duties, operating motorized equipment, supervising or assisting with the loading or unloading of a motor vehicle, and inspecting, servicing, or maintaining any vehicle.

(8) Department--The Texas Department of Transportation.

(9) Directly involved--Potentially responsible for a serious accident or a serious marine incident [~~accident~~].

(10) Driving for the department--Operating a vehicle, including an automobile, truck, motor-driven equipment, roller, tractor, grader, ferry, or aircraft, during the course and scope of employment, without regard to ownership of the vehicle or the frequency of operation. An employee holds a position that involves driving for the department if the position may require driving for the department.

(11) Drug--A narcotic drug, controlled substance, or marijuana, as defined in the Comprehensive Drug Abuse Prevention and Control Act of 1970, 21 U.S.C. [~~USC~~] §802, not including a substance legally available by prescription or over the counter.

(12) Employee--A person employed by the department in a full-time, part-time, temporary, project, or seasonal position, including temporary recruitment employees, but not including other temporary employees under contract to the department.

(13) Employee Assistance Program (EAP)--A program designed to assist employees and their immediate family members in dealing with emotional and personal problems, including alcohol and drug abuse, that potentially affect an employee's work performance and safety.

(14) EAP counselors--Licensed medical doctors; licensed doctors of osteopathy; psychologists licensed or certified by the Texas State Board of Examiners of Psychologists or another regulating board; social workers licensed or certified by the Texas State Board of Social Worker Examiners or another regulating board; employee assistance professionals licensed or certified by the Employee Assistance Professionals Association, Inc., or another regulating board; and addiction counselors certified by the National Association of Alcoholism and Drug Abuse Counselors Certification Commission, by the International Certification and Reciprocity Consortium/Alcohol and Other Drug Abuse, or by another regulating board, with knowledge of and clinical experience in the diagnosis and treatment of alcohol- and drug-related disorders, including Substance Abuse Professionals as defined in 49 C.F.R. [~~CFR,~~] Part 40.

(15) Final applicant--A person who is given a conditional offer of initial employment.

(16) Human Resources Division--An organizational unit in the department's Austin headquarters that oversees human resource functions for the department.

(17) Inhalant--A breathable chemical that produces mind-altering vapors, including volatile solvents, aerosols, nitrites, and anesthetics.

(18) Mandatory referral--A referral to the EAP that requires an employee to report to the EAP and complete treatment or be terminated from employment with the department.

(19) Medical review officer--A licensed physician who is responsible for reviewing laboratory results generated by an employer's drug testing program and evaluating medical explanations for certain drug test results.

(20) Possession of alcohol or drugs--The presence of alcohol or drugs in an area under an employee's effective control.

(21) Safety-sensitive activity--Any activity, as determined by the director of the Human Resources Division, that:

(A) could present a threat to the health or safety of employees or the public if performed with inattentiveness, errors in judgment, diminished coordination, reduced dexterity, or lack of composure; and

(B) is performed with such independence that it cannot reasonably be assumed that mistakes could be prevented by a supervisor or another employee.

(22) Safety-sensitive employee--An employee who holds a safety-sensitive position.

(23) Safety-sensitive position--A full-time, part-time, temporary, project, or seasonal position, as determined by the director of the Human Resources Division, that requires the performance of one or more safety-sensitive activities at least four times in twelve consecutive months.

(24) Serious accident--Any accident involving a commercial motor vehicle or that occurs on a day in which the employee has performed or will perform a safety-sensitive activity and resulting in:

(A) injury to an employee who is directly involved in the accident, who requires professional medical treatment beyond first aid, and who does not return to work on the day following the injury or who returns to work to perform restricted duties;

(B) death or injury to another person who requires professional medical treatment beyond first aid;

(C) damage to a vehicle that causes it to be inoperable; or

(D) receipt of a citation under state or local law for a moving traffic violation in connection with the accident.

(25) Serious marine incident [~~accident~~]--Any reportable marine incident [~~accident~~] resulting in:

(A) injury to an employee who is directly involved in the incident [~~accident~~], who requires professional medical treatment beyond first aid, and who does not return to work or who returns to work to perform restricted duties;

(B) death or injury to another person who requires professional medical treatment beyond first aid;

(C) damage to property in excess of $100,000;

(D) actual or constructive total loss of any ferry subject to Coast Guard inspection under 46 U.S.C. [~~USC~~] §3301 or to any self-propelled vessel [~~ferry~~] of 100 gross tons or more if not subject to Coast Guard inspection;

(E) a discharge of 10,000 or more gallons of oil into navigable waters of the United States; or

(F) a discharge of a reportable quantity of a hazardous substance into the environment or into the navigable waters of the United States.

(26) Substance control officer--An employee who administers the substance abuse program.

(27) Treatment--Medical or psychological therapy or education for alcohol or drug dependency, whether conducted on an inpatient basis, on an intensive outpatient basis, or as educational or counseling sessions. Treatment includes any aftercare following inpatient treatment or intensive outpatient treatment, including weekly counseling sessions as designated by the EAP counselors.

(28) Supervisor--Any employee who has formal supervisory or managerial responsibilities, who is designated to coordinate the work activities of other employees, or who is designated to direct a team of employees.

(29) Use of alcohol or a drug--The ingestion by any means of any substance containing alcohol, including medication; the use in any way of a drug; or being under the influence of alcohol, an inhalant, or a drug. Drug use and drug abuse include the use of an inhalant in a manner other than that for which it was intended and that causes or is known to cause intoxication.

(30) Vessel Crewmember--An individual who:

(A) is working on board a vessel, whether or not as a member of the vessel's crew;

(B) occupies or performs the functions of a position required by the vessel's Certificate of Inspection;

(C) performs the duties of a patrolman or watchman; or

(D) is assigned during an emergency to warn passengers or control the movement of passengers on a vessel.

(31) Workplace--Any location where an employee works, whether or not on state-owned property. An employee is in the workplace when operating or riding in a state vehicle.

§4.34. Illegal Drugs.

(a) Distribution. An employee will be terminated from the department if convicted of a criminal drug violation relating to the sale, distribution, transportation, or manufacture of drugs, whether in the workplace or outside the workplace. A final applicant will not be hired if the final applicant is on probation or parole for a felony conviction related to the sale, distribution, transportation, or manufacture of drugs or the possession with the intent to sell, distribute, transport, or manufacture drugs. An employee will be terminated from the department if it is determined that at the time of hire, the employee was on probation or parole for a felony conviction related to the sale, distribution, transportation, or manufacture of drugs or the possession with the intent to sell, distribute, transport, or manufacture drugs.

(b) Suspicious substance. The following procedure will be followed if a substance appearing to be a drug is found in the possession of an employee in the workplace. It will also be followed if an employee is reasonably suspected of selling, distributing, transporting, or manufacturing drugs, or conspiring to sell, distribute, transport, or manufacture drugs, whether in the workplace or outside the workplace. Reasonable suspicion may be based on any circumstance, including direct observation in the workplace or an arrest, charge, or indictment for an offense related to selling, distributing, transporting, or manufacturing drugs.

(1) The employee's supervisor will immediately place the employee on administrative leave pending investigation by the department.

(2) The employee will immediately be provided with a letter that:

(A) summarizes the facts on which reasonable suspicion is based;

(B) notifies the employee that involvement in selling, distributing, transporting, or manufacturing drugs subjects the employee to termination from the department;

(C) advises that the employee will have a specified time in which to provide a reasonable explanation to the employee's supervisor or substance control officer; and

(D) advises that the employee may be terminated from the department if the employee refuses to offer a reasonable explanation, if the response indicates that the employee sold, distributed, transported, or manufactured drugs, or conspired to sell, distribute, transport, or manufacture drugs, or if the response is insufficient or unacceptable.

(3) An employee who is suspected of involvement in selling, distributing, transporting, or manufacturing drugs will be terminated from the department if:

(A) the employee fails to respond within the specified time or to provide a sufficient and acceptable explanation;

(B) the substance control officer confirms the illegal acts; or

(C) investigation by law enforcement or other governmental authorities confirms the illegal acts.

(4) An employee who used or possessed drugs in the workplace, but did not sell, distribute, transport, or manufacture drugs, or conspire to sell, distribute, transport, or manufacture drugs, will be mandatorily referred to the EAP and required to complete treatment if:

(A) the employee fails to respond within the specified time or to provide a sufficient and acceptable explanation;

(B) the substance control officer confirms the illegal acts; or

(C) investigation by law enforcement or other governmental authorities confirms the illegal acts.

(5) An employee will be made aware of the EAP if it is determined that the employee used drugs outside the workplace and did not use drugs in the workplace or sell, distribute, transport, or manufacture drugs.

(6) If an employee is reasonably suspected of selling, distributing, transporting, or manufacturing drugs, or conspiring to sell, distribute, transport, or manufacture drugs, the substance control officer shall contact the Office of General Counsel or the substance abuse program staff of the Human Resources Division immediately, before turning the matter over to law enforcement authorities.

(c) Notifications.

(1) An employee shall notify the employee's supervisor in writing if the employee is arrested, charged, or indicted for an offense related to selling, distributing, transporting, or manufacturing drugs, whether in the workplace or outside the workplace. If the employee fails to make this notification within one day after returning to work following the occurrence, the employee will be suspended three [~~five~~] days without pay. [~~The five day suspension will occur during a single work week if the employee is an FLSA-exempt employee~~].

(2) An employee shall notify the employee's supervisor in writing if the employee is convicted of [~~for~~] an offense related to selling, distributing, transporting, or manufacturing drugs, whether in the workplace or outside the workplace. If the employee fails to make this notification within one day after returning to work following the occurrence, the employee will be terminated from the department whenever it is discovered.

(3) An employee shall notify the employee's supervisor in writing if the employee is convicted of any violation of any criminal drug statute based on the employee's conduct in the workplace for which notification is not required under paragraph (2) of this subsection. This notification must occur within one work day after the employee returns to work following the conviction if the violation is related to conduct that occurred in the workplace. If the employee fails to make this notification on time, the department will suspend the employee within 30 days after it discovers the conviction. The suspension

will be for three [~~five~~] days without pay [~~and will occur during a single work week if the employee is an FLSA-exempt employee~~]. Under the Drug Free Workplace Act 1988, 41 U.S.C. [~~USC~~] §§701-707, the department will notify the appropriate federal agency of the conviction within 10 days after receipt of the notice.

§4.37. Test Results.

(a) An employee shall complete the following requirements if the employee has a positive drug test result or an alcohol test result of 0.04 or greater, if the employee refuses to test, or if the employee is a commercial driver, safety-sensitive employee, or vessel crewmember who violated §4.44(b)(1)-(5) of this subchapter.

(1) The supervisor or the substance control officer will mandatorily refer the employee to the EAP and require the employee to complete treatment.

(2) The employee will undergo a return-to-duty alcohol or drug test. An alcohol test must indicate a result of less than .02, and a drug test must indicate a verified negative result. An employee will be terminated from the department if the employee fails to pass the return-to-duty drug or alcohol test.

(3) The employee will provide a completed return-to-work form before resuming any critical duties. Commercial drivers, vessel crewmembers, and safety-sensitive employees who are not required to provide a return-to-work form will still be subject to a return-to-duty test.

(4) The employee will undergo follow-up testing for alcohol or drugs for up to 60 months. Follow-up testing will include at least 6 tests in the first 12 months after the employee's return to duty. The number and frequency of follow-up tests will be established by the EAP counselors. The EAP counselors may terminate the requirement for further testing at any time after the first six tests have been administered. An employee who fails to pass a follow-up drug or alcohol test has not completed treatment and will be terminated from the department.

(b) An employee will be terminated from the department if the employee refuses to test or has a positive drug test result or an alcohol test result of 0.04 or greater and is still in the employee's initial probationary [~~six-month probation~~] period or is a project or temporary employee.

(c) If an employee has an alcohol test with a result of 0.02 or greater but less than 0.04, the supervisor or the substance control officer will prohibit the employee from working for 24 hours and will require the employee to take sick leave, vacation leave, compensatory time, or leave without pay. The employee will only be required to take leave without pay if the employee has exhausted all accrued leave.

§4.39. Refusal To Test.

(a) Employees in general. The department will mandatorily refer an employee to the EAP if the employee refuses to test, except commercial drivers, safety-sensitive employees, and vessel crewmembers.

(b) Commercial drivers, safety-sensitive employees, and vessel crewmembers. A commercial driver, safety-sensitive employee, or vessel crewmember will be terminated from the department if the employee refuses to test.

(c) Covered conduct. An employee will be considered to have refused to test under any of the following circumstances.

(1) The employee explicitly declines to take a required test, whether a first test or a subsequent test.

(2) The employee fails to appear for an alcohol or drug test, except a pre-employment test, within a reasonable time, as determined by the department, after being directed to do so.

(3) The employee fails to remain at the testing site until the testing process is complete. In the case of a pre-employment test, a final applicant who leaves the testing site before the testing process begins has not refused to test.

(4) The employee does not attempt to provide a breath specimen for a required alcohol test or to provide a urine specimen for a required drug test.

(5) The employee does not permit the observation or monitoring of the employee's provision of a specimen in the case of directly observed or monitored collection.

(6) The employee fails to provide a sufficient breath specimen or a sufficient amount of urine when directed and there is no adequate medical explanation for the failure, as determined through a required medical evaluation.

(7) The employee fails to undergo a medical examination or evaluation that was directed by an appropriate official. In the case of a pre-employment test, the final applicant has refused to test on this basis only if the test is conducted after the final applicant has been given a conditional offer of employment.

(8) The employee fails to sign the certification at Step 2 of the Alcohol Testing Form.

(9) The employee fails to cooperate in any part of the testing process, including refusing to empty pockets when so directed by the collector, behaving in a confrontational way that disrupts the collection process, fails to wash hands after being directed to do so by the collector, or any other uncooperative behavior.

(10) The specimen contains levels of a substance that is lower than expected for human urine, a specimen that contains levels of a substance that are inconsistent with human urine, or a specimen has a creatinine and specific gravity value lower than expected for human urine.

(11) A commercial driver, safety-sensitive employee, or vessel crewmember does not remain available for a mandatory post-accident alcohol or drug test.

(12) For an observed collection, the employee fails to follow the observer's instructions to raise clothing above the waist, lower clothing and underpants, or to turn around to permit the observer to determine if the employee has any type of prosthetic or other device that could be used to interfere with the collection process.

(13) The employee possesses or wears a prosthetic or other device that could be used to interfere with the collection process.

(14) The employee admits to the collector or medical review officer that the employee adulterated or substituted the specimen.

§4.42. Recurrence of Substance Abuse.

(a) Recurrence as grounds for termination. An employee will be terminated on the need to be mandatorily [~~instead of being~~] referred to the EAP a second time. A second referral after a break in service will be treated as if there had been no break in service.

(b) Exceptions. It is not considered a mandatory referral within the meaning of this section if:

(1) an employee is assessed by the EAP counselors as not needing assistance in resolving problems associated with alcohol or drug use on a first mandatory referral; or

(2) an employee is referred for an alcohol- or drug-related driving offense.

(c) Effect of pre-1999 referrals. An employee will be terminated from the department if the employee received and completed one or two mandatory referrals before January 1, 1999, and that employee becomes subject to mandatory referral for a third time.

§4.43. Employees Who Drive for the Department.

(a) Scope. An employee who drives for the department is subject both to the requirements of this section and to the general requirements that apply to all employees.

(b) Records. [~~District engineers, division directors, office directors, and the administration will maintain current lists of all employees who drive for the department.~~] Each employee's driving record will be checked at least once each year. Each employee who drives for the department shall sign a form acknowledging awareness of the department's driving policies.

(c) Driver's licenses. An employee must have a valid driver's license to drive for the department. An occupational driver's license will be accepted if it allows the employee to perform driving duties for the department, other than operating a commercial motor vehicle. Employees without a valid driver's license will be removed from all driving duties, and the supervisor will assign non-driving duties, if available.

(d) Loss of legal authority to drive.

(1) An employee shall notify the employee's supervisor if the employee loses the legal authority to drive as a result of any alcohol- or drug-related driving offense. If the employee fails to make this report within one day after returning to work following the loss of legal authority to drive, the employee will be suspended three [~~five~~] days without pay. [~~The five-day suspension will occur during a single work week if the employee is an FLSA-exempt employee.~~]

(2) An employee will be terminated from the department if the employee drives for the department after losing the legal authority to drive as a result of any alcohol- or drug-related driving offense.

(e) Alcohol- and drug-related driving offenses. If an employee has an alcohol- or drug-related driving offense, the following procedures will be followed.

(1) An employee shall report an alcohol- or drug-related driving offense to the employee's supervisor. If the employee fails to make this report within one day after returning to work following the occurrence, the employee will be suspended three [~~five~~] days without pay. [~~The five-day suspension will occur during a single work week if the employee is an FLSA-exempt employee.~~]

(2) The employee will be mandatorily referred to the EAP and required to complete treatment.

(3) The employee will be given a letter summarizing these actions. The employee shall acknowledge receipt by signing the letter and returning it to the supervisor.

(4) The employee will be removed from critical duties until the employee provides a completed return-to-work form. The employee will be reassigned to temporary modified duties or will be required to take sick leave, vacation leave, compensatory time, or leave without pay. The employee will only be required to take leave without pay if the employee has exhausted all accrued leave.

(5) An employee will be terminated from the department after a second alcohol- or drug-related driving offense within five years.

(f) Final applicants.

(1) The department will not hire a final applicant for a position that may involve driving for the department if the final applicant has two alcohol- or drug-related driving offenses within three years before the date of application.

(2) The department will not hire a final applicant for a seasonal position that requires driving for the department if the final applicant has an alcohol- or drug-related driving offense within the three years before the date of application. A seasonal employee will be terminated if hired in violation of this paragraph.

(3) The department will not hire a final applicant for a position that involves driving for the department if the final applicant has an alcohol- or drug-related driving offense within three years before the date of application unless the final applicant agrees to:

(A) complete treatment; and

(B) comply with the procedures described in subsection (e) of this section.

§4.44. Commercial Drivers, Safety-Sensitive Employees, and Vessel Crewmembers.

(a) Scope. Commercial drivers, safety-sensitive employees, and vessel crewmembers are subject both to the requirements of this section and to the general requirements that apply to all employees.

(b) Prohibited activities. Commercial drivers, safety-sensitive employees, and vessel crewmembers shall not:

(1) report to work within four hours of consuming alcohol;

(2) report to work or remain at work while under the influence of alcohol or drugs;

(3) consume or possess alcohol while on duty or while driving a commercial motor vehicle;

(4) use alcohol within eight hours after an accident or before undergoing a post-accident alcohol test, whichever comes first;

(5) have a positive drug test result or an alcohol test result of 0.04 or greater; or

(6) refuse to test.

(c) Testing.

(1) The department will not hire or employ a final applicant for a position as a commercial driver, a safety-sensitive employee, or a vessel crewmember unless that final applicant passes a drug test.

(A) A current employee must pass a drug test before being transferred or promoted into a position as a commercial driver, safety-sensitive employee, or vessel crewmember. The department may waive this requirement if the employee was tested for drugs by the department during the preceding three-year period and all drug test results were negative and if the employee has never been mandatorily referred to the EAP. If a current employee is required to take a drug test under this subparagraph and fails that drug test, the employee will not be transferred or promoted into the position and will be mandatorily referred to the EAP and required to complete treatment.

(B) The department will notify a final applicant of the results of a pre-employment drug test if the applicant requests those results in writing within 60 calendar days after being notified of the disposition of the employment application. The department will also inform the applicant which drugs, if any, were verified as positive.

(C) Pre-employment inquiries for commercial drivers and vessel crewmembers will be conducted in accordance with 49 C.F.R. [~~CFR,~~] Part 40.

(2) Commercial drivers and safety-sensitive employees are subject to post-accident testing if directly involved in a serious accident. Vessel crewmembers are subject to post-accident testing if directly involved in a serious marine incident [~~accident~~].

(A) Nothing in this section requires or permits delaying medical attention for injured people or prohibits an employee from leaving the scene of an accident for as long as necessary to obtain assistance in responding to the accident or to obtain emergency medical care.

(B) Alcohol and drug tests will be administered after a serious accident or a serious marine incident [~~accident~~].

(i) An alcohol test should be administered as soon as possible after a serious accident or a serious marine incident [~~accident~~] and preferably within two hours. If the test is not administered within two hours, it may be administered within eight hours. In that case, the substance control officer will record why the test was not promptly administered.

(ii) A drug test should be administered as soon as possible after a serious accident and in any event within 32 hours.

(iii) A drug test should be administered as soon as possible after a serious marine incident [~~accident~~]. If a drug test is not administered within 32 hours due to safety concerns, it may be administered as soon as the safety concerns are addressed [~~later~~]. If the drug test was not administered within 32 hours [~~In that case~~], the substance control officer will record why the test was not promptly administered.

(C) The department will rely on a breath or blood test for the use of alcohol or a urine test for the use of drugs if it is conducted by federal, state, or local officials having independent authority for the test, if it conforms to applicable federal, state or local requirements, and if the department obtains the results of the tests.

(3) Commercial drivers and vessel crewmembers are subject to random alcohol and drug testing.

(A) Commercial drivers and vessel crewmembers will be selected for alcohol and drug testing on a random basis so that each employee has a substantially equal chance of selection. A commercial driver or vessel crewmember will be subject to the possibility of random testing as long as the employee is employed by the department in that capacity. The department may randomly test all commercial drivers in one or more sections if each section is equally subject to selection, and the department may randomly test all vessel crewmembers on one vessel as long as each vessel is equally subject to selection.

(B) The Human Resources Division will ensure that at least 10% of commercial drivers and 10% of vessel crewmembers are tested annually for alcohol and that at least 50% are tested annually for drugs.

(d) Administrative and disciplinary actions.

(1) A commercial driver, safety-sensitive employee, or vessel crewmember who violates subsection (b) of this section will be subject to all potential administrative and disciplinary actions available under this subchapter.

(2) The commercial driver, safety-sensitive employee, or vessel crewmember will be removed from critical duties until the employee provides a completed return-to-work form. The employee will be reassigned to temporary modified duties or will be required to take sick leave, vacation leave, compensatory time, or leave without pay. The employee will only be required to take leave without pay if the employee has exhausted all accrued leave.

(3) A final applicant for a position as a commercial driver, safety-sensitive employee, or vessel crewmember will not be hired if the final applicant has engaged in conduct that would violate subsection (b) of this section and has not received the equivalent of the required treatment. A commercial driver, safety-sensitive employee, or vessel crewmember will be terminated from the department if it is determined that at the time of hire, the applicant had engaged in conduct that would violate subsection (b) of this section and had not received the equivalent of the required treatment.

(e) Education. Each commercial driver, safety-sensitive employee, vessel crewmember, and supervisor of an employee in any of those categories will receive training on indications of alcohol or drug use and on the effects of alcohol and drug use on personal health, safety, and the work environment.

(f) Additional reporting requirements for vessel crewmembers.

(1) If a vessel crewmember receives a positive drug test result, the substance control officer shall report it in writing to the nearest Coast Guard Officer in Charge, Marine Inspection.

(2) A vessel crewmember who has received a positive drug test result may not perform vessel crewmember duties until found by the medical review officer to be drug free and to pose a sufficiently low risk for further illegal drug use and the requirements of 46 C.F.R. Part 5 have been satisfied. The employee must agree to follow-up testing determined by the medical review officer for an additional period of up to 60 months.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on August 29, 2008.

TRD-200804691
Bob Jackson
General Counsel
Texas Department of Transportation
Earliest possible date of adoption: October 12, 2008
For further information, please call: (512) 463-8683

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CHAPTER 9. CONTRACT MANAGEMENT
SUBCHAPTER B. HIGHWAY IMPROVEMENT CONTRACTS

43 TAC §§9.11 - 9.19

The Texas Department of Transportation (department) proposes amendments to §9.11, Definitions, §9.12, Qualification of Bidders, §9.13, Notice of Letting and Issuance of Proposals, §9.14, Submittal of Proposal, §9.15, Acceptance, Rejection, and Reading of Proposals, §9.16, Tabulation of Bids, §9.17, Award of Contract, §9.18, After Contract Award, and §9.19, Emergency Contract Procedures.

EXPLANATION OF PROPOSED AMENDMENTS

Transportation Code, Chapter 223, Subchapter A, prescribes the method by which the department receives competitive bids for the improvement of highways that are a part of the state highway system. Pursuant to this authority, the Texas Transportation Commission (commission) previously adopted §§9.10 - 9.21 to

specify the process by which the department will award state highway improvement contracts.

In accordance with Transportation Code, §223.013, the amendments accommodate the submission of bids for highway improvement contracts electronically, and prescribe department policy and procedure in determining bidder eligibility when bidder affiliations exist. The following is a synopsis of the amendments for each affected section. Except as noted, the revisions are nonsubstantive in nature.

Amendments to §9.11, Definitions, include additional definitions for the terms "Electronic Bidding System (EBS)" and "Electronic vault," which are necessary to accommodate the submission of electronic bids associated with EBS that will be deposited into the electronic vault. Definitions for unnecessary terms have been removed, while references to the term "proposal" have been replaced with the term "bid." Previously, these terms were used interchangeably; this revision provides clarity and uniformity within the subchapter. Consequently, the term "proposal" is replaced with the term "bid" throughout the remainder of the subchapter. In addition, the term "Executive director" has been revised to include the director's designee not below the level of district engineer or division director. Previously, this designation was referenced separately in each affected section. With the exception of §9.19, Emergency Contract Procedures, these separate executive director designations have been removed to provide uniformity within the rule. The separate executive director designation retained in §9.19 is necessary as the designation for emergency contracts differs from the executive director definition as revised. This revision provides uniformity and clarity throughout the affected rule.

Amendments to §9.12, Qualification of Bidders, involve designating the terms currently and routinely used in referring to the application documents that must be submitted by a contractor to be considered as eligible to bid on department highway improvement contracts. The "Confidential Questionnaire" is the application form that must be submitted by a contractor for bidding eligibility on department contracts requiring financial prequalification, while the "Bidder's Questionnaire" is the application form that may be submitted by a contractor for eligibility to bid on department highway improvement contracts where the financial requirements have been waived. Amendments to subsection (c) require that a bidder submit a bidder's questionnaire to the department's headquarters office in Austin ten days prior to the date bids are opened to be eligible to bid on projects for which the audited financial data has been waived. This revision coincides with similar existing submission requirements for the confidential questionnaire and provides uniformity within the rule. Subsection (d) is added to prescribe policy and procedure in determining bidder eligibility on department highway improvement contracts when bidder affiliations are determined to exist. This new section is necessary to ensure the integrity of the department's competitive bid process, and prevent the actual or perceived existence of bidder collusion, by addressing those instances where affiliated bidders submit separate bids for the same project. Criteria used by the department to determine bidder affiliations are included in this new subsection to identify those firms that are so closely affiliated that the operations of one firm are dependent on the other. An appeal process is limited to those bidders who are determined to be affiliated based solely on a family connection. This appeal process is necessary as the department realizes that, in certain instances, a bidder determined to be affiliated based solely on a family connection may operate independently from the affiliated entity. This section has also been reorganized to provide clarity regarding department requirements associated with the submittal of bids for highway improvement contracts.

Amendments to §9.14, Submittal of Bid, involve revisions necessary to implement EBS and clarify the requirements that apply to manually and electronically submitted bids. The use of EBS in submitting a bid to the department is at the bidder's discretion. The department will continue to accept manually submitted bids, however, once EBS is fully implemented, the department will begin charging a fee for manually submitted bids. The amount of the fee will be determined based on the department's administrative cost in processing manual bids. New subsection (b), Manually submitted bids, is added to define the manual bid forms acceptable for bid submission and the bidder's option to print a bid form from EBS for manual submission. New subsection (c), Electronically submitted bids, establishes the requirements for the submission of an electronic bid. Section 9.14(d), Bid guaranty, is amended to clarify the submission requirements for bid bonds by joint venture participants. In addition, new §9.14(d)(5) specifies that the bid bond for an electronically submitted bid must be a electronic bid bond as the acceptance of digital checks is not currently supported by the EBS software. Due to the administrative burden and increased possibility of errors in properly matching manually submitted checks with electronically submitted bids, the department will not accept manual checks for bids submitted electronically. These revisions are necessary for the department to effectively implement EBS.

Amendments to §9.15 include revisions to existing subsection (b)(2) clarifying that all bids will be rejected if bids are submitted on the same project separately by a joint venture and one or more members of that joint venture. In addition, new subsection(b)(3) adds the condition that the department will not accept or read bids submitted by affiliated bidders on the same project. This revision is needed to ensure the integrity of the competitive bidding process and prevent the actual or perceived existence of bidder collusion. New subsections (c)(3) and (d)(2) are added to clarify the bid revision and bid withdrawal requirements for electronically submitted bids, which are necessary to effectively implement EBS.

Amendments to §9.16(b), Department interpretations, include revisions to subsections (b)(3) and (b)(4) to describe how the department will determine the low bid amount when multiple bids are received from a bidder for the same project and one of the bids received is electronic. During the initial implementation phase of EBS when both an electronic and a manual bid are received from a bidder and both bids are determined to be responsive, the department will use the manually submitted bid to determine the total bid amount for the bid. Once EBS is fully implemented, the department will revise this rule to specify that in those instances when both a responsive electronic bid and a responsive manual bid are received from a bidder, the electronic bid will be used by the department to determine the total bid amount for the bid. These revisions are necessary to effectively implement EBS while ensuring the successful submittal of bids for highway improvement contracts during the initial implementation phase of EBS.

FISCAL NOTE

James Bass, Chief Financial Officer, has determined that for each of the first five years the amendments as proposed are in effect, there will be no fiscal implications for state or local governments as a result of enforcing or administering the amendments.

Thomas Bohuslav, Director, Construction Division has certified that there will be no significant impact on local economies or overall employment as a result of enforcing or administering the amendments.

PUBLIC BENEFIT AND COST

Mr. Bohuslav has also determined that for each year of the first five years the sections are in effect, the public benefit anticipated as a result of enforcing or administering the amendments will be to preserve the integrity of the competitive bidding process, while facilitating the use of an electronic bidding for the department's highway improvement contracts. The use of electronic bids will also assist in reducing the number of nonresponsive bids while providing a more efficient bidding process for qualified bidders. There are no anticipated economic costs for persons required to comply with the sections as proposed. There will be no adverse economic effect on small businesses.

SUBMITTAL OF COMMENTS

Written comments on the proposed amendments to §§9.11 - 9.19 may be submitted to Thomas Bohuslav, Director, Construction Division, Texas Department of Transportation, 125 East 11th Street, Austin, Texas 78701-2483. The deadline for receipt of comments is 5:00 p.m. on October 13, 2008.

STATUTORY AUTHORITY

The amendments are proposed under Transportation Code, §201.101, which provides the commission with the authority to establish rules for the conduct of the work of the department, and more specifically, Transportation Code, §223.004, which provides the commission with the authority to prescribe conditions for the rejection of a bid, Transportation Code, §223.0041, which provides the commission with the authority to adopt rules concerning the award of contracts, Transportation Code, §223.005, which provides the commission with the authority to adopt rules for contracts involving less than $300,000, Transportation Code, §223.007, which provides the commission with the authority to prescribe the form of contracts, Transportation Code, §223.013, which provides the department with the authority to create an electronic bidding system to receive bids for highway improvement contracts electronically, and Transportation Code, §223.014, which provides the commission with authority related to bid guaranties.

CROSS REFERENCE TO STATUTE

Transportation Code, §§223.001 - 223.016.

§9.11. Definitions.

The following words and terms, when used in this subchapter, shall have the following meanings, unless the context clearly indicates otherwise.

(1) Advertisement--The public announcement required by law inviting bids for work to be performed or materials to be furnished.

(2) Alternate bid item--A bid item identified by the department as an acceptable substitute for a regular bid item.

(3) Apparent low bidder--The bidder determined to have the numerically lowest total bid as a result of the tabulation of bids by the department.

(4) Available bidding capacity--The contractor's approved bidding capacity less uncompleted work on department contracts.

(5) Award--The commission's acceptance of a contractor's bid for a proposed contract that authorizes the department to enter into a contract.

(6) Bid--The offer of the bidder for performing the work described in the plans and specifications including any changes made by addenda.

[~~(6) Bidder--An individual, partnership, limited liability company, corporation, or joint venture submitting a bid for a proposed contract.~~]

(7) Bid bond--The security executed by the contractor and the surety furnished to the department to guarantee payment of liquidated damages if the contractor fails to enter into an awarded contract.

(8) Bidder--An individual, partnership, limited liability company, corporation, or joint venture submitting a bid for a proposed contract.

[~~(8) Bid error--A mathematical mistake by the prime contractor in the unit bid price entered in the proposal.~~]

(9) Bidder's Questionnaire--A prequalification form that reflects detailed equipment and experience data but waives audited financial data.

(10) [~~(9)~~] Bidding capacity--The maximum dollar value a contractor may have under contract with the department at any given time.

(11) Bid error--A mathematical mistake by the bidder in the unit bid price entered in the bid.

(12) Bid guaranty--The security furnished by the bidder as a guaranty that the bidder will enter into a contract if awarded the work.

(13) [~~(10)~~] Building contract--A contract entered under Transportation Code, Chapter 223, Subchapter A, for the construction or maintenance of a department building or appurtenant facilities. Building contracts are considered to be highway improvement contracts.

(14) [~~(11)~~] Certificate of insurance--A form approved by the department covering insurance requirements stated in the contract.

(15) [~~(12)~~] Certification of Eligibility Status form--A notarized form describing any suspension, voluntary exclusion, ineligibility determination actions by an agency of the federal government, indictment, conviction, or civil judgment involving fraud, official misconduct, each with respect to the bidder or any person associated with the bidder in the capacity of owner, partner, director, officer, principal investor, project director/supervisor, manager, auditor, or a position involving the administration of federal funds, covering the three-year period immediately preceding the date of the qualification statement.

(16) [~~(13)~~] Commission--The Texas Transportation Commission or authorized representative.

(17) [~~(14)~~] Confidential Questionnaire--A prequalification form reflecting detailed financial and experience data.

(18) [~~(15)~~] Construction contract--A contract entered under Transportation Code, Chapter 223, Subchapter A, for the construction or reconstruction of a segment of the state highway system.

(19) [~~(16)~~] Department--The Texas Department of Transportation.

[~~(17) Deputy executive director--Any second tier manager appointed by the executive director.~~]

(20) [~~(18)~~] Disadvantaged business enterprise (DBE)--Has the meaning assigned by §9.51(10) of this chapter (relating to Definitions).

(21) [~~(19)~~] District engineer--The chief executive officer in each of the designated district offices of the department.

(22) Electronic Bidding System (EBS)--The department's automated system that allows bidders to enter and submit their bid information electronically.

(23) Electronic vault--The secure location where electronic bids are stored prior to bid opening.

(24) [~~(20)~~] Emergency--Any situation or condition of a designated state highway, resulting from a natural or man-made cause, that poses an imminent threat to life or property of the traveling public or which substantially disrupts or may disrupt the orderly flow of traffic and commerce.

(25) [~~(21)~~] Executive director--The executive director of the Texas Department of Transportation or the director's designee not below the level of district engineer or division director.

(26) [~~(22)~~] Highway improvement contract--A contract entered into under Transportation Code, Chapter 223, Subchapter A, for the construction, reconstruction, or maintenance of a segment of the state highway system, or for the construction or maintenance of a building or other facility appurtenant to a building [~~A construction, maintenance, or building contract~~].

(27) [~~(23)~~] Historically underutilized business (HUB)--Has the meaning assigned by §9.51(16) of this chapter.

(28) [~~(24)~~] Joint venture--Any combination of individuals, partnerships, limited liability companies, or corporations submitting a single bid [~~proposal~~].

(29) [~~(25)~~] Letting official--The executive director or any department employee empowered by the executive director to officially receive bids and close the receipt of bids at a letting.

(30) [~~(26)~~] Maintenance contract--A contract entered under Transportation Code, Chapter 223, Subchapter A, for the maintenance of a segment of the state highway system.

(31) [~~(27)~~] Materially unbalanced bid--A bid which generates a reasonable doubt that award to the bidder submitting a mathematically unbalanced bid will result in the lowest ultimate cost to the state.

(32) [~~(28)~~] Mathematically unbalanced bid--A bid containing lump sum or unit bid items that do not reflect reasonable actual costs plus a reasonable proportionate share of the bidder's anticipated profit, overhead costs, and other indirect costs.

[~~(29) Preventive maintenance contract--Contracts let through the construction contracting procedure to preserve and prevent further deterioration of the roadways and rights of way, with all its components.~~]

[~~(30) Proposal--The offer of the bidder, made out on the prescribed form, including addenda issued, giving bid prices for performing the work described in the plans and specifications.~~]

[~~(31) Proposal guaranty--The security designated in the proposal and furnished by the bidder as a guaranty that the bidder will enter into a contract if awarded the work.~~]

(33) [~~(32)~~] Regular bid item--A bid item contained in a bid form [~~proposal~~] and not designated as an alternate bid item.

(34) [~~(33)~~] Routine maintenance contract--Contracts let through the routine maintenance contracting procedure to preserve and repair roadways and rights of way, with all its components, to its designed or accepted configuration.

(35) [~~(34)~~] Small business enterprise (SBE)--Has the meaning assigned by §9.51(22) of this chapter.

§9.12. Qualification of Bidders.

(a) Eligibility. To be eligible to bid on department contracts, potential bidders must satisfy the requirements listed in this section.

(b) [~~(a)~~] Confidential Questionnaire [~~Audited financial qualification of construction and maintenance bidders~~]. Unless waived under subsection (c) of this section, a potential bidder must be prequalified in accordance with this section [~~paragraph (2) of this subsection~~] to be eligible to bid on a construction or maintenance contract [~~a potential bidder must be prequalified in accordance with paragraph (1) of this subsection~~].

(1) A potential bidder must: [~~Requirements.~~]

[~~(A) To be qualified to bid on a construction or maintenance contract, a potential bidder must:~~]

(A) [~~(i)~~] submit a Confidential Questionnaire [~~confidential questionnaire~~] to the department's Construction Division in Austin 10 days prior to the last day of bid opening, in a form prescribed by the department, which shall include certain information concerning the bidder's equipment and experience as well as financial condition;

(B) [~~(ii)~~] have its certified public accountant submit the audited and other financial information required by the current edition of the department's Bulletin Number 2, titled "Accounting Procedures in Determination of Contractor's Financial Resources";

(C) [~~(iii)~~] satisfactorily comply with any technical qualification requirements determined by the department to be necessary for a specific project; and

(D) [~~(iv)~~] for the purpose of bidding on federal-aid projects, properly complete the Certification of Eligibility Status form contained in the Confidential Questionnaire.

(2) [~~(B)~~] The department will make its examination and determination under this subsection based on the information submitted, and will advise the potential bidder of its approved bidding capacity. Information adverse to the potential bidder contained in the Certification of Eligibility Status form will be reviewed by the department and the Federal Highway Administration, and may result in the bidder being declared ineligible to submit bids on federal-aid projects.

(3) [~~(C)~~] Satisfactory audited financial information will grant a 12-month period of qualification from the date of the financial statement.

(4) [~~(D)~~] A three month grace period of qualification, for the purpose of preparing and submitting current audited information, will be granted prior to the expiration date of the financial statement.

(5) [~~(E)~~] The department may require current audited information at any time if circumstances develop which are factors that could alter the firm's financial condition, ownership structure, affiliation status, or ability to operate as an on-going concern.

(c) Bidders Questionnaire. The department may waive audited financial qualification requirements as provided by this subsection.

[~~(2) Waiver.~~]

[~~(A) The department will waive the audited financial qualification requirements of paragraph (1) of this subsection if~~]

(1) The department will waive the qualification requirements of subsection (b) of this section if:

(A) the engineer's estimate is $300,000 or less;[,]

(B) the project is a maintenance project;[,] or

(C) the project pertains to specialty items not normal to the department's roadway projects program.

(2) A waiver will not be given under paragraph (1) of this subsection if [~~unless~~] the executive director [~~or the director's designee~~] determines that audited financial qualification should be required due to:

(A) [~~(i)~~] safety considerations;

(B) [~~(ii)~~] the complexity of the work; or

(C) [~~(iii)~~] the potential impact of the work on adjacent property owners.

(3) [~~(B)~~] To be eligible to bid on a contract for which the audited financial qualification requirements have been waived under this subsection [~~subparagraph (A) of this paragraph~~], or on a contract to be awarded under §9.19 of this subchapter [~~title (relating to Emergency Contract Procedures)~~], a bidder must:

(A) [~~(i)~~] submit a bidder's questionnaire to the department's headquarters office in Austin 10 days prior to the date the bid opens, in a form prescribed by the department, which includes certain information concerning a bidder's equipment and experience;

(B) [~~(ii)~~] submit unaudited and other data as required in the instructions to the bidder's questionnaire;

(C) [~~(iii)~~] satisfactorily comply with any technical qualification requirements determined by the department to be necessary on a specific project; and

(D) [~~(iv)~~] for a federal-aid project, properly complete the Certification of Eligibility Status form contained in the bidder's questionnaire. [~~(~~]Information adverse to the potential bidder contained in the certification will be reviewed by the department and by the Federal Highway Administration, and may result in the bidder being declared ineligible to submit bids on a federal-aid project[~~)~~].

(4) [~~(C)~~] The department will make its examination and determination under this subsection based on the information submitted, and advise the bidder of its approved bidding capacity.

(A) [~~(i)~~] A bidder with no prior experience in construction or maintenance, or a negative working capital position (i.e., financial statements indicate that current liabilities exceed current assets), will receive a bidding capacity of $300,000.

(B) [~~(ii)~~] An experienced bidder with sufficient working capital and financial capability, as determined by the department, will receive a bidding capacity of:

(i) [~~(I)~~] $500,000 for a bidder submitting compiled financial information if the principals of the bidder have at least one year experience in construction or maintenance and have satisfactorily completed at least two projects in these fields;

(ii) [~~(II)~~] $1,000,000 for a bidder submitting compiled financial information if the principals of the bidder have at least two years experience in construction or maintenance and have satisfactorily completed at least four projects in these fields. [~~(~~] Those contractors possessing more than two years experience will be granted an additional $250,000 in bidding capacity for each additional year of experience in construction or maintenance, with a maximum bidding capacity of $3,000,000[~~)~~]; and

(iii) [~~(III)~~] over $1,000,000 for a bidder submitting reviewed financial information if the principals of the bidder have at least three [~~two~~] years of experience in construction or maintenance and have satisfactorily completed at least six [~~four~~] projects in these fields. The amount of the bidding capacity will be determined by multiplying the net working capital by a factor determined by the department based upon the expected dollar volume of projects to be awarded and the number of bidders prequalified by the department. In the event that this calculation does not result in an amount greater than $1,000,000, the bidder will receive a bidding capacity of $1,000,000.

(d) Affiliated entities. In making examinations and determinations under this section, the department will make a determination of bidder affiliations. Bidders the department determines are affiliated are not eligible to submit bids for the same project. A bidder that is determined to be affiliated solely because of a family relationship may request, in accordance with this subsection, an exception to its ineligibility.

(1) For purposes of this subchapter:

(A) two or more firms are affiliated if:

(i) the firms share common officers, directors, or stockholders;

(ii) a family member of an officer, director, or stockholder of one firm serves in a similar capacity in another of the firms;

(iii) an individual who has an interest in, or controls a part of, one firm either directly or indirectly also has an interest in, or controls a part of, another of the firms;

(iv) the firms are so closely connected or associated that one of the firms, either directly or indirectly, controls or has the power to control another firm;

(v) one firm controls or has the power to control another of the firms; or

(vi) the firms are closely allied through an established course of dealings, including but not limited to the lending of financial assistance; and

(B) a family member of an individual is the individual's parent, parent's spouse, step-parent, step-parent's spouse, sibling, sibling's spouse, spouse, child, child's spouse, spouse's child, spouse's child's spouse, grandchild, grandparent, uncle, uncle's spouse, aunt, aunt's spouse, first cousin, or first cousin's spouse.

(2) To request the exception, a bidder must submit to the executive director a written request explaining the basis for the exception accompanied by supporting evidence. The written request must be received not later than the 30th day before the date of the bid opening for which the exception is requested.

(3) The department will review the request and supporting evidence provided to determine the affiliation or independence of the potential bidders. The department will consider, in addition to other affiliation criteria:

(A) transactions between the potential bidders; and

(B) the extent to which the potential bidders share:

(i) equipment;

(ii) personnel;

(iii) office space; and

(iv) finances.

(4) The department will not grant an exception if the bidders affiliated by a family relationship are not independent.

(5) The executive director will review the department's finding and will send to the bidder the final written determination. An exception granted to the bidder remains in effect for future bid openings unless the exception is revoked under paragraph (6) of this subsection.

(6) The granting of an exception under this subsection does not remove the classification of the bidders as affiliated. The department reserves the right to conduct follow-up reviews and revoke the exception if the follow-up reviews indicate that the bidders are no longer independent.

(7) Affiliated bidders that are granted an exception under this subsection and that have been sanctioned in accordance with Subchapter G of this chapter must meet the exception criteria in Subchapter G to be eligible to bid.

(e) [~~(b)~~] Building contracts. To be eligible to bid on a building contract, a potential bidder must satisfactorily comply with any financial, experience, technical, or other requirement contained in the governing specifications applicable to the project.

(f) [~~(c)~~] Financial statements. For purposes of this section, an audited financial statement involves an examination of the accounting system, records, and financial statements by an independent certified public accountant in accordance with generally accepted auditing standards. Based on the examination, the auditor expresses an opinion concerning the fairness of the financial statements in conformity with generally accepted accounting principles. A reviewed financial statement is substantially less in scope than an audited financial statement, and consists primarily of inquiries of company personnel and analytical procedures applied to financial data by an independent certified public accountant. Only negative assurance is expressed by the auditor, meaning the auditor is not aware of any material modifications that should be made in order for the financial statements to conform to generally accepted accounting principles. A compiled financial statement is limited to presenting in the form of financial statements information that is the representation of management. No opinion or any other form of assurance is expressed on the statements by the auditor.

§9.13. Notice of Letting and Issuance of Bid Forms [~~Proposals~~].

(a) Notice to bidders. A person may apply to have his or her name placed on a mailing list to receive the Notice to Contractors for a fee of $65 per year to cover costs of mailing the notices.

(b) Fee exemption. The following entities are not required to pay the notice subscription fee:

(1) qualified bidders approved under §9.12 of this subchapter [~~title (relating to Qualification of Bidders)~~];

(2) other state agencies;

(3) other state departments of transportation;

(4) disadvantaged business enterprises and historically underutilized businesses;

(5) offices of the federal government; and

(6) organizations performing work under supportive service contracts awarded by the commission.

(c) Advertising. Contracts will be advertised in accordance with Transportation Code, §223.002, Government Code, §2155.083(h)(1), and Title 23, Code of Federal Regulations, §635.112(b).

(d) Bid [~~Proposal~~] form.

(1) Bid [~~Proposal~~] form content. A bid [~~proposal~~] form may [~~will~~] include:

(A) the location and description of the proposed work;

(B) an approximate estimate of the various quantities and kinds of work to be performed or materials to be furnished;

(C) a schedule of items for which unit prices are requested;

(D) the time within which the work is to be completed; and

(E) the special provisions and special specifications.

(2) Form of request. A request for a bid [~~proposal~~] form on a highway improvement contract may be made orally or in writing.

(e) Issuance of bid [~~proposal~~] form.

(1) Construction and maintenance contracts.

(A) Issuance. Except where prohibited under subparagraph (B) of this paragraph, the department will, upon receipt of a request, issue a bid [~~proposal~~] form for a construction or maintenance contract as follows:

(i) for a project on which audited financial prequalification is not waived, only to a prequalified bidder, and only if the estimated cost of the project is within that bidder's available bidding capacity; and

(ii) for a project on which audited financial qualification is waived under §9.12(b)(1) [~~§9.12(a)(2)~~] of this subchapter [~~title~~], only if the estimated cost of the project is within that bidder's available bidding capacity.

(B) Non-issuance. Except as provided in subparagraph (C) of this paragraph, the department will not issue a bid [~~proposal~~] form requested by a bidder for a construction or maintenance contract if at the time of the request the bidder:

(i) is disqualified by an agency of the federal government as a participant in programs and activities involving federal assistance and benefits, and the contract is for a federal-aid project;

(ii) is suspended or debarred by order of the commission;

(iii) is prohibited from rebidding a specific project because of default of the first awarded contract;

(iv) has not fulfilled the requirements for qualification under §9.12 of this subchapter [~~title~~];

(v) is prohibited from rebidding that project as a result of having previously submitted a mathematically and materially unbalanced bid resulting in the rejection of the bid by the commission; or

(vi) is prohibited from rebidding that project as a result of having submitted a bid containing an error resulting in the rejection of bids by the commission.

(C) Exception. The department may issue a bid form [~~proposal~~] under a temporary approval to a bidder who would be ineligible under subparagraph (B)(iv) of this paragraph if the bidder has substantially complied with the requirements of §9.12 of this subchapter [~~title~~].

(2) Building contracts.

(A) Issuance. Except as provided in subparagraph (B) of this paragraph, the department will issue, upon request, a bid [~~proposal~~] form to a bidder having complied with §9.12(d) [~~§9.12(b)~~] of this subchapter [~~title~~].

(B) Non-issuance. The department will not issue a bid [~~proposal~~] form requested by a bidder for a building contract if, at the time of the request, the bidder:

(i) is disqualified by an agency of the federal government as a participant in programs and activities involving federal assistance and benefits and the contract is a federal-aid project;

(ii) is suspended or debarred by order of the commission; or

(iii) is prohibited from bidding that project because of default of the first awarded contract.

(3) All contracts. The department will not issue a bid [~~proposal~~] form for a highway improvement contract to a bidder if the bidder or a subsidiary or affiliate of the bidder has received compensation from the department to participate in the preparation of the plans or specifications on which the bid or contract is based.

§9.14. Submittal of Bid [~~Proposal~~].

(a) Bids for department highway improvement contracts may be submitted either manually or electronically.

(b) Manually submitted bids. For the purpose of manually submitting a bid, an acceptable bid form is the form that is printed and given to the bidder by the department, a computer printout that meets the requirements of paragraph (3) of this subsection, or a form printed by the bidder from EBS.

(1) [~~(a)~~] Delivery of Bid [~~Proposal~~]. The bidder shall place each completed bid [~~proposal~~] form in a sealed envelope marked to show its contents. When submitted by mail, this envelope shall be placed in another envelope which shall be sealed and addressed as indicated in the notice. Bids must be received on or before the hour and date set for the receipt and opening of bids and must be in the hands of the department letting official by that time.

(2) [~~(b)~~] Bid [~~Proposal~~] content. The bidder shall submit the bid [~~proposal on the form furnished by the department and~~] in compliance with the following requirements.

(A) [~~(1)~~] Except as provided in subparagraph (B) of this paragraph [~~(2) of this subsection~~] and paragraph (3) of this subsection [~~(c) of this section~~], the blank spaces for each item as required in the bid [~~proposal~~] form shall be filled in by writing in words in ink.

(B) [~~(2)~~] The bidder shall submit a unit price for each item for which a bid is requested (including a zero if appropriate), except in the case of a regular bid item that has an alternate bid item. In such case, prices must be submitted for the base bid or with the set of items of one or more of the alternates.

(C) [~~(3)~~] The bid [~~proposal~~] shall be executed with ink in the complete and correct name of the bidder making the bid [~~proposal~~] and be signed by the person or persons authorized to bind the bidder.

(D) [~~(4)~~] Except in the case of a regular bid item that has an alternate bid item, unit prices shall be stated in dollars and/or cents for each bid item listed in the bid form [~~proposal~~].

(3) [~~(c)~~] Computer printouts.

(A) [~~(1)~~] For manually submitted bids, a bidder may, in [~~In~~] lieu of writing in words in ink, [~~a bidder may~~] submit an original computer printout sheet bearing the authorized signature for the bidder. The unit prices shown on acceptable printouts will be the official unit prices used to tabulate the official total bid amount and used in the contract if awarded by the commission.

(B) [~~(2)~~] Computer printouts are not acceptable on building contracts.

(c) Electronically submitted bids. In lieu of submitting a printed bid form, the bidder may submit the bid electronically using EBS in accordance with this subsection.

(1) Bids must be received by the electronic vault on or before the time and date set for the receipt and opening of bids.

(2) For the submission or withdrawal of electronic bids, the bidder is responsible for obtaining its use of a computer system and access to the Internet.

(3) The department is not responsible for a bidder being unable to submit or withdraw a bid due to the unavailability of the Internet.

(4) The bid shall be in the correct name of the bidder making the bid and executed by digitally signing the bid by the person or persons authorized to bind the bidder or bidders, in the case of a joint venture, using the digital signature assigned in the digital certificate issued to the person by the department.

(5) For purposes of this subsection, digital certificate means an electronic identifier assigned in a digital certificate and intended by the person using it to have the same force and effect as the use of a manual signature for signing an electronic document.

(d) Bid [~~Proposal~~] guaranty. Except as provided in paragraph (5) of this subsection, a [~~A~~] bidder must submit a bid [~~proposal~~] guaranty with the bid [~~proposal form~~].

(1) Except as provided in paragraph (2) or (5) of this subsection, the bid [~~proposal~~] guaranty must be in the amount specified by the bid [~~proposal~~] form, made payable to the order of the commission, and in the form of a cashier's check, money order, or teller's check drawn by or on a state or national bank, savings and loan association, or a state or federally chartered credit union (collectively referred to as a "bank"). The check must be payable at or through the institution issuing the instrument, or must be drawn by a bank on a bank, or by a bank and payable at or through a bank. The form of the instrument must be identified on the instrument's face.

(2) A bidder may submit a bid bond, in lieu of providing the guaranty required in paragraph (1) of this subsection. The bid bond shall be on the form and in the amount specified by the department. A bid bond will only be accepted from a surety company authorized to execute a bond under and in accordance with state law. The bond must be dated on or before the date of the bid opening, bear the impressed seal of the surety company and the name of the bidder, and be signed by the bidder or bidders, in the case of a joint venture, and an authorized representative of the surety company. As an alternative for joint venture bidders, each of the bidders may submit a separate bid bond, completed as outlined in this paragraph. Powers of attorney must be attached to the bid bond. The bid bond amount required by the department must be within the surety company's authorized bonding limit.

(3) The department will not accept as a bid [~~proposal~~] guaranty:

(A) personal checks or certified checks;

(B) other types of money orders; or

(C) checks or money orders more than 90 days old.

(4) The commission will establish by order bid [~~proposal~~] guaranty and bid bond amounts. The commission may require a greater amount for a bid bond in order to compensate for increased administrative costs associated with bid bonds.

(5) For bids submitted electronically under subsection (c) of this section, the bid guaranty must be an electronic bid bond, the form of which must be the most current version issued by the department. For joint venture bidders, the bond must be made in the name of all joint venture bidder participants. The bond authorization code must be entered into the authorization code field contained in EBS. Only bond authorization codes from the companies listed in the most recent version of EBS are acceptable. Printed checks or bid bond forms are not acceptable as guaranties for electronic bids.

§9.15. Acceptance, Rejection, and Reading of Bids [~~Proposals~~].

(a) Public reading. Bids will be opened and read in accordance with Transportation Code, §223.004 and §223.005. Bids for contracts with an engineer's estimate of less than $300,000 may be filed with the district engineer at the headquarters for the district, and opened and read at a public meeting conducted by the district engineer, or his or her designee on behalf of the commission.

(b) Bids [~~Proposals~~] not read.

(1) The department will not accept and will not read a bid [~~proposal~~] if:

(A) the bid [~~proposal~~] is submitted by an unqualified bidder;

(B) the bid [~~proposal~~] is in a form other than the official bid [~~proposal~~] form issued to the bidder;

(C) the certification and affirmation are not signed;

(D) the bid [~~proposal~~] was not in the hands of the letting official at the time and location specified in the advertisement;

(E) the bidder modifies the bid [~~proposal~~] in a manner that alters the conditions or requirements for work as stated in the bid [~~proposal~~];

(F) the bid [~~proposal~~] guaranty, when required, does not comply with §9.14(c) [~~§9.14(d)~~] of this subchapter [~~chapter (relating to Submittal of Proposal)~~];

(G) the bidder did not attend a specified mandatory prebid conference;

(H) the bid does not include a fully completed historically underutilized business subcontracting plan in accordance with §9.54(c)(1) of this chapter [~~(relating to Historically Underutilized Business (HUB) Program)~~] when required;

(I) a computer printout bid [~~proposal~~], when used, does not have the unit bid prices entered in designated spaces, is not signed in the name of the firm or firms to whom the bid [~~proposal~~] was issued, or omits required bid items or includes items not shown in the bid [~~proposal~~];

(J) the bidder was not authorized to be issued a bid form [~~proposal~~] under §9.13(e) of this subchapter [~~chapter (relating to Notice of Letting and Issuance of Proposals)~~];

(K) the bid [~~proposal~~] did not otherwise conform with the requirements of §9.14 of this subchapter [~~chapter~~];

(L) the bidder fails to properly acknowledge receipt of all addenda;

(M) the bid [~~proposal~~] submitted has the incorrect number of bid items; or

(N) the bidder bids more than the maximum or less than the minimum number of allowable working days shown on the plans when working days is a bid item.

(2) If bids are [~~more than one proposal involving a bidder under the same or different names is~~] submitted on the same project separately by a joint venture and one or more members of that joint venture, the department will not accept and will not read any of the bids [~~proposals~~] submitted by the joint venture and those members [~~that bidder~~] for that project.

(3) If bids are submitted on the same project by affiliated bidders as determined under §9.12(c) of this subchapter, the department will not accept and will not read any of the bids submitted by the affiliated bidders for that project.

(c) Revision of bid [~~by bidder~~].

(1) For a manually submitted bid, a [~~A~~] bidder may change a bid price before it is submitted to the department by changing the price in the printed bid form and initialing the revision in ink; [~~.~~]

(2) For a manually submitted bid, a [~~A~~] bidder may change a bid price after it is submitted to the department by requesting return of the bid in writing prior to the expiration of the time for receipt of bids, as stated in the advertisement. The request must be made by a person authorized to bind the bidder. The department will not accept a request by telephone or telegraph, but will accept a properly signed facsimile [~~telefacsimile~~] request. The revised bid must be resubmitted prior to the time specified for the close of the receipt of bids.

(3) For an electronically submitted bid, a bidder may change a unit bid price in EBS and resubmit electronically to the electronic vault until the time specified for the close of the receipt of bids. Each bid submitted will be retained in the electronic vault. The electronic bid with the latest date and time stamp by the vault will be used for bid tabulation purposes.

(d) Withdrawal of bid.

(1) A bidder may withdraw a manually submitted bid by submitting a request in writing before the time and date of the bid opening. The request must be made by a person authorized to bind the bidder. The department will not accept telephone or telegraph requests, but will accept a properly signed facsimile [~~telefacsimile~~] request. Except as provided in §9.16(c) of this subchapter [~~chapter (relating to Tabulation of Bids)~~] and §9.17(d) of this subchapter [~~chapter (relating to Award of Contract)~~], a bidder may not withdraw a bid subsequent to the time for the receipt of bids.

(2) A bidder may withdraw an electronically submitted bid by submitting an electronic or written request to withdraw the bid. An electronic withdrawal request must be submitted using EBS. The request, whether electronic or written, must be submitted by a person who is authorized by the bidder to submit the request and received by the department before the time and date of the bid opening.

(e) Unbalanced bids. The department will examine the unit bid prices of the apparent low bid for reasonable conformance with the department's estimated prices. The department will evaluate a bid with extreme variations from the department's estimate, or where obvious unbalancing of unit prices has occurred. For the purposes of the evaluation, the department will presume the same retainage percentage for all bidders. In the event that the evaluation of the unit bid prices reveals that the apparent low bid is mathematically and materially unbalanced, the bidder will not be considered in future bids for the same project.

§9.16. Tabulation of Bids.

(a) Official bid amount. Except for lump sum building contract bid items, the official total bid amount for each bidder will be

determined by multiplying the unit bid price written in for each item by the respective quantity and totaling those amounts.

(b) Department interpretations.

(1) Bids [~~Proposals~~] where unit bid prices have been left blank will be considered by the department to be incomplete and nonresponsive. If a bid [~~proposal~~] has a regular and a corresponding alternate bid item or group of items, the bid [~~proposal~~] will not be considered to be incomplete if either the regular bid item, or group of items, or the alternate bid item, or group of items, has a unit bid price entered. If both a regular bid item, or group of items, and a corresponding alternate bid item, or group of items, are left blank, the bid will be considered to be incomplete and nonresponsive. [~~(~~]A bidder who elects to bid on a bid item group corresponding to a regular or alternate bid item, or group of items, must include unit bid prices for each bid item contained in the bid item group[~~)~~].

(2) Bid [~~Proposal~~] entries such as no dollars and no cents, zero dollars and zero cents, or numerical entries of $0.00 will be interpreted to be one-tenth of a cent ($.001) and will be entered in the bid tabulation as $.001, except as provided in paragraph (6) of this subsection. Any entry extended to more than three decimal places will be rounded to the nearest tenth of a cent and entered as such. [~~(~~]For rounding purposes contained in this subsection, entries of five-hundredths of a cent or more will be rounded up to the next highest tenth of a cent, while entries of four-hundredths of a cent or less will be rounded down to the next lowest tenth of a cent[~~)~~].

(3) If the bidder submits both an electronic bid and a properly completed manual bid, the department will use the manually submitted bid to determine the total bid amount of the bid. If the bidder submits an electronic bid and a manual bid that is not complete, the department will use the electronic bid to determine the total bid amount of the bid. [~~If a bidder submits both a completed proposal form and a properly completed computer printout, the department will use the computer printout to determine the total bid amount of the proposal. If the computer printout is incomplete, the department will use the completed proposal form to determine the total bid amount of the proposal.~~]

(4) If the bidder submits two or more manual bids, all responsive manual bids will be tabulated, and the department will use the lowest bid tabulation to determine the total bid amount of the bid. [~~If a bidder submits two computer printouts reflecting different totals both printouts will be tabulated, and the department will use the lowest tabulation.~~]

(5) If a unit bid price is illegible, the department will make a documented determination of the unit bid price for tabulation purposes.

(6) If a unit bid price has been entered for both the regular bid item, or group of items, and a corresponding alternate bid item, or group of items, the department will determine the option that results in the lowest total cost to the state and tabulate as such, except as provided in subparagraphs (A) and (B) of this paragraph. If both the regular and alternate bids result in the same cost to the state the department will select the regular bid item or items.

(A) If both a regular bid item or a group of items, and a corresponding alternate bid item or group of items, have an entry such as no dollars and no cents, zero dollars and zero cents, or numerical entries of $0.00, the department will make two calculations using one-tenth of a cent ($.001) for each item as described in paragraph [~~subparagraph~~] (2) of this subsection. The department will determine the option that results in the lowest total cost to the state and tabulate as such. If both the regular and alternate bids result in the same cost to the state the department will select the regular bid item or items.

(B) If a unit bid price greater than zero has been entered for either a regular bid or corresponding alternate bid item, or a group of items, and an entry of no dollars and no cents, zero dollars and zero cents, or a numerical entry of $0.00 has been entered for the other corresponding item, or group of items, the department will use the unit bid price that is greater than zero for bid tabulation.

(c) Tie bids. In the event the official bid amount for two or more bidders is equal and those bids are the lowest submitted, each tie bidder will be given an opportunity to withdraw its bid. If two or more tie bidders decline to withdraw their bids, the low bidder will be determined by a coin toss. If all tie bidders request to withdraw their bids, no withdrawals will be allowed and the low bidder will be determined by a coin toss.

(d) Bid [~~Proposal~~] guaranty. Not later than 72 hours after bids are opened, the department will mail the check or money order bid [~~proposal~~] guaranty of each bidder except the apparent low bidder to the address specified on the return bidder's check form included in the bid [~~proposal~~]. Bid bonds will not be returned.

(e) Bid errors. The commission will consider a bid error that meets the notification requirements contained in paragraph (1) of this subsection and satisfies the criteria contained in paragraph (2) of this subsection in the award of a contract.

(1) The apparent low bidder must submit written notification of an alleged bid error to the department's Construction Division within five business days after the date bids [~~proposals~~] are opened for the project. The notification must identify the items of work involved and must include bid documentation, such as quotes received, calculations made, or other related documentation used in bid preparation[~~,~~] that substantiates the alleged error. Once the notification is submitted to the department, it may not be revised or supplemented unless additional information is requested by the department.

(2) The commission will consider the following criteria in determining whether a bid error exists:

(A) the alleged bid error relates to a material item of work contained in the bid;

(B) the alleged bid error is a significant portion of the total bid as compared to the intended bid contained in the documentation submitted by the contractor in accordance with paragraph (1) of this subsection, and other contractor bids;

(C) the alleged bid error occurred despite the contractor's exercise of ordinary care in preparing its bid; and

(D) delay in the completion of the project will not have a significant impact on the cost to and safety of the public.

(3) The commission may consider an alleged bid error caused by an effort to unbalance the bid as failure to exercise ordinary care.

(4) When the engineer's estimate on a project is less than $300,000, the executive director [~~or the director's designee~~] may determine whether a bid error exists, under the same conditions and criteria as provided in paragraphs (1) and (2) of this subsection.

§9.17. Award of Contract.

(a) The commission may reject any and all bids opened, read, and tabulated under §9.15 and §9.16 of this subchapter [~~chapter (relating to Acceptance, Rejection, and Reading of Proposals, and Tabulation of Bids)~~]. It will reject all bids if:

(1) there is reason to believe collusion may have existed among the bidders;

(2) the lowest bid is determined to be both mathematically and materially unbalanced;

(3) the lowest bid is higher than the department's estimate and the commission determines that re-advertising the project for bids may result in a significantly lower low bid;

(4) the lowest bid is higher than the department's estimate and the commission determines that the work should be done by department forces; or

(5) the lowest bid is determined to contain a bid error that meets the notification requirements contained in §9.16(e)(1) of this subchapter and satisfies the criteria contained in §9.16(e)(2) of this subchapter.

(b) Except as provided in subsections [~~subsection~~] (c), (d), or (e) of this section, if the commission does not reject all bids, it will award the contract to the lowest bidder.

(c) In accordance with [~~the~~] Government Code, Chapter 2252, Subchapter A, the commission will not award a contract to a nonresident bidder unless the nonresident underbids the lowest bid submitted by a responsible resident bidder by an amount that is not less than the amount by which a resident bidder would be required to underbid the nonresident bidder to obtain a comparable contract in the state in which the nonresident's principal place of business is located.

(d) For a maintenance contract for a building or a segment of the state highway system involving a bid amount of less than $300,000, if the lowest bidder withdraws its bid after bid opening, the executive director may recommend to the commission that the contract be awarded to the second lowest bidder.

(1) For purposes of this subsection, the term "withdrawal" includes written withdrawal of a bid after bid opening, failure to provide the required insurance or bonds, or failure to execute the contract.

(2) The executive director may recommend award of the contract to the second lowest bidder if he or she, in writing, determines that the second lowest bidder is willing to perform the work at the unit bid prices of the lowest bidder; and

(A) the unit bid prices of the lowest bidder are reasonable, and delaying award of the contract may result in significantly higher unit bid prices;

(B) there is a specific need to expedite completion of the project to protect the health or safety of the traveling public; [~~,~~] or

(C) delaying award of the contract would jeopardize the structural integrity of the highway system.

(3) The commission may accept the withdrawal of the lowest bid after bid opening if it concurs with the executive director's determinations.

(4) If the commission awards a contract to the second lowest bidder and the department successfully enters into a contract with the second lowest bidder, the department will return the lowest bidder's bid [~~proposal~~] guaranty upon execution of that contract. The lowest bidder may be considered in default and will be subject to debarment under §9.100, et seq. of this chapter.

(e) When additional information is required to make a final decision, the commission may defer the award or rejection of the contract until the next regularly scheduled commission meeting.

(f) Contracts with an engineer's estimate of less than $300,000 may be awarded or rejected by the executive director [~~or the director's designee~~] under the same conditions and limitations as provided in subsections (a) - (c) of this section.

(g) The commission may rescind the award of any contract prior to contract execution upon a determination that it is in the best interest of the state. In such an instance, the bid [~~proposal~~] guaranty will be returned to the bidder. No compensation will be paid to the bidder as a result of this cancellation.

§9.18. After Contract Award.

(a) Contract execution.

(1) Except as provided in paragraphs (2) and (3) of this subsection, within 15 days after written notification of award of a contract, the successful bidder must execute and furnish to the department the contract with:

(A) a performance bond and a payment bond, if required and as required by [~~the~~] Government Code, Chapter 2253, with powers of attorneys attached, each in the full amount of the contract price except as provided by subsection (c) of this section, executed by a surety company or surety companies authorized to execute surety bonds under and in accordance with state law. [~~(~~]Department interpretations made in accordance with §9.16(b)(2) of this subchapter [~~chapter~~] (relating to Tabulation of Bids) will be used to determine the contract amount for providing a performance bond and payment bond, if required, and as required by the Government Code, Chapter 2253[~~.)~~];

(B) a certificate of insurance showing coverages in accordance with contract requirements;

(C) when required, written evidence of current good standing from the Comptroller of Public Accounts; and

(D) a list of all quoting subcontractors and suppliers.

(2) A successful bidder on a routine maintenance contract will be required to provide the certificate of insurance prior to the date the contractor begins work as specified in the department's order to begin work.

(3) Within the time specified in the contract, the successful bidder on a construction contract containing a DBE or SBE goal, who is not a DBE or SBE, must submit all the information required by the department in accordance with §9.53(e) of this chapter (relating to Disadvantaged Business Enterprise (DBE) Program) and §9.55(c) of this chapter (relating to Small Business Enterprise (SBE) Program). The successful bidder must comply with paragraph (1) of this subsection within 15 days after written notification of acceptance by the department of the successful bidder's documentation to achieve the DBE or SBE goal.

(b) Bid [~~Proposal~~] guaranty. The department will retain the bid [~~proposal~~] guaranty of the successful bidder until after the contract has been executed and bonded. If the successful bidder does not comply with subsection (a) of this section, the bid [~~proposal~~] guaranty will become the property of the state, not as a penalty but as liquidated damages; provided, however, the department may, based on documentation submitted by the contractor, grant a 15-day extension to comply with the requirements under subsection (a)(3) of this section. A bidder who forfeits a bid [~~proposal~~] guaranty will not be considered in future bids [~~proposals~~] for the same work unless there has been a substantial change in the design of the project subsequent to the forfeiture of the bid [~~proposal~~] guaranty.

(c) Performance or payment bonds. For maintenance contracts the department may require that a performance or payment bond:

(1) be in an amount equal to the greatest annual amount to be paid under the contract and remain in effect for one year from the date work is resumed after any default by the contractor; or

(2) be in an amount equal to the amount to be paid the contractor during the term of the bond and be for a term of two years, renewable annually in two-year increments.

§9.19. Emergency Contract Procedures.

(a) Purpose. In accordance with Transportation Code, Chapter 223, Subchapter C, the department is authorized under certain conditions to award highway improvement contracts in cases of emergency. This section provides for an alternate procedure for the expedited award of highway improvement contracts to meet emergency conditions in which essential corrective or preventive action would be unreasonably hampered or delayed by compliance with other laws, this subchapter, or other sections of Part I of this title.

(b) Certification of emergency.

(1) A district engineer who identifies an emergency situation in the geographic area under his or her jurisdiction and determines that expedited action is required shall immediately notify the executive director or the director's designee not below the level of deputy executive director to describe the fact and nature of the emergency. Upon receiving authorization to proceed, the district engineer may initiate procedures for the award of an emergency contract. All such notification will be documented in writing.

(2) Examples of types of work which may qualify for emergency contracts include but are not limited to emergency repair or reconstruction of streets, roads, highways, and bridges; clearing debris or deposits from the roadway or in drainage courses within the right of way; removal of hazardous materials; restoration of stream channels outside the right of way in certain conditions; temporary traffic operations; and mowing to eliminate safety hazards; provided, however, that in each instance, the proposed work must satisfy the requisites of emergency as defined in this subchapter.

(3) Before the contract is awarded, the executive director or the director's designee not below the level of deputy executive director must certify in writing the fact and nature of the emergency giving rise to the award.

(c) Contractor eligibility. To be eligible to bid on an emergency contract, a contractor must be included in the department's list of prequalified bidders pursuant to §9.12 of this subchapter [~~title~~] (relating to Qualification of Bidders) or must complete a bidder's questionnaire in a form prescribed by the department.

(d) Notification of prospective bidders.

(1) After an emergency is certified, the district engineer will review the department's file of eligible bidders and, if there are [~~is~~] a sufficient number of firms, notify at least three of those firms.

(2) Consistent with and contingent upon the nature of the emergency, the district engineer may contact prospective bidders by telephone, letter, facsimile [~~telefacsimile~~], or other appropriate form of communication.

(3) The district engineer will inform each prospective bidder of the nature of the emergency and furnish specifications for the remedy, including time constraints, bonding and insurance requirements, and any additional information needed for the prospective bidder to prepare a work plan and calculate the cost.

(4) If no eligible contractor is able to provide the required type of service, the district engineer may take any measure necessary to identify and locate an available contractor who is able to provide the required service. If selected, the prospective contractor thus identified must complete the bidder's questionnaire prior to final approval of the award.

(e) Bidding requirements.

(1) A prospective bidder's bid [~~proposal~~] must be in writing and must include:

(A) a price for performing the work; and

(B) a response to each item in the district engineer's specifications if the price is based on other than unit price.

(2) If the district engineer so authorizes, the prospective bidder may submit an oral bid which must be confirmed in writing within 24 hours.

(f) Letting procedures.

(1) The district engineer will review the bids and, if awarded, shall award the contract to the best bidder and document the basis for the award. As used in this subsection, the best bidder is that firm best able to respond to the emergency in a timely manner and fulfill the state's priority needs as determined by the district engineer.

(2) Each bidder will be notified as soon as possible after the award is made, with written confirmation to follow.

(g) Contract.

(1) The department shall prescribe the form of the emergency contract and may include therein such matters and specifications as it deems advantageous to the state, including but not limited to provisions which address the specifications for completion of work, cost to perform the work, the basis for payment, time period needed to complete the work, control of work, insurance and bonding requirements, and any general or special conditions mutually agreed upon by the department and the contractor.

(2) Each such contract shall be made in the name of the State of Texas, signed by the executive director or the director's designee not below the level of district engineer on behalf of the department, and signed by the contracting party.

(3) The contractor must furnish satisfactory proof of insurance and bonds before any work is performed.

(4) The contract must be fully executed before any work is begun.

(5) The certification required in subsection (b) of this section must be attached to the contract.

(h) Exceptions. If the district engineer determines that the magnitude and extremity of the emergency require instantaneous action by the contractor in order to alleviate an immediate detrimental impact on public health and safety, and the executive director or the director's designee not below the level of deputy executive director has so noted in the certification of the emergency, the following exceptions are permitted.

(1) The district engineer may authorize the contractor to begin work:

(A) without a signed contract, provided the contract is signed within 24 hours after work begins; and

(B) without bonds and proof of insurance, provided they are furnished not more than three days after work begins.

(2) The executive director or deputy executive director may authorize the waiving of bonds or insurance requirements if it is determined that such requirements cannot be met prior to completion of the work or would prevent the timely performance of work to the detriment of public health, safety, or welfare.

(i) Reports to the commission. Not later than 24 hours after the contract is awarded, the district engineer shall notify the executive director or the director's designee not below the level of deputy executive director of the award of the emergency contract. Not later than the fifth working day following the date on which the contract is awarded, the executive director shall furnish each member of the commission written notification of the details of the emergency conditions and the award.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on August 29, 2008.

TRD-200804692
Bob Jackson
General Counsel
Texas Department of Transportation
Earliest possible date of adoption: October 12, 2008
For further information, please call: (512) 463-8683

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SUBCHAPTER G. CONTRACTOR SANCTIONS

The Texas Department of Transportation (department) proposes the repeal of §§9.100 - 9.106 in its entirety and simultaneously proposes new §§9.100 - 9.117 all concerning contractor sanctions.

EXPLANATION OF PROPOSED REPEALS AND NEW SECTIONS

The department's contractor sanction rules set forth the circumstances under which contractors may be sanctioned and the procedures that must be followed. The commission previously adopted §§9.100 - 9.106 to specify the process by which the department will administer and manage contractor sanctions associated with highway improvement contracts.

The proposed repeals and new sections are necessary to incorporate the consideration of an internal compliance program applicable to a contractor's organization in considering the application and level of a sanction; provide an opportunity for an informal hearing concerning a sanction decision prior to filing a formal appeal or request that an indirect sanction imposed as a result of an affiliation based solely on a family connection with a sanctioned firm be lifted; and reorganize the rules to provide clarity and better organization. In addition, the existing rule was reorganized and rewritten to provide better understanding and a chronological order of events in the consideration and application of sanctions. For reference purposes, detailed explanations of the location of existing rule are provided for each of the proposed new sections below.

New §9.100, Purpose, reorganizes and replaces existing §9.100 and sets forth the purpose of this subchapter to protect the health, welfare, and safety of the traveling public and the state's investment in its state highway system. No substantial revisions from the existing rule were made.

New §9.101, Definitions, reorganizes and replaces existing §9.101. This new section includes a new definition for a contractor compliance program that outlines the program components necessary for the department to consider its existence in the determination and application of sanctions. Public trust and confidence is of the utmost importance to the department and the department desires that its partners in transportation exhibit a high commitment to ethical behavior. The proposed rule changes provide a possible mitigating circumstance for imposing sanctions if the contractor has an ethics and compliance program in place at the time of the offense. Detailed information concerning the components necessary for department recognition of the existence of a contractor compliance program serves to provide clarification and understanding to affected parties, and ensure that a compliance program is potentially effective and not pro forma in nature. Definitions for unnecessary terms contained in the existing rule were removed. No other substantial revisions from the existing rule were made.

New §9.102, Grounds for Sanctions, the language of which is found in existing §9.106(a), specifies the grounds or conditions for which a contractor may be sanctioned. New §9.102(a)(1)(A) - (C) references fraud, violation of federal or state antitrust laws, embezzlement, theft, forgery, bribery, falsification or destruction of records, making false statements, tax evasion, receiving stolen property, making false claims, and obstruction of justice as grounds for sanctions. The existing rule simply referenced bidding crimes. The new section provides detailed information regarding the department's interpretation of a bidding crime as it relates to sanctions. This expanded definition of a bidding crime provides clarification and necessary information to affected parties concerning the department's interpretation of a bidding crime, and serves to protect the integrity of the department's competitive bidding process by ensuring that those contractors that have demonstrated fiscal irresponsibility are not eligible to bid on department highway improvement contracts. No other substantial revisions from the existing rule were made.

New §9.103, Notification of Rules, reorganizes and replaces existing §9.102(a) and states that failure to receive a copy of the sanction rules is not a contractor defense to an alleged violation of the rules. No substantial revisions from the existing rule were made.

New §9.104, Referral to Executive Director, combines, reorganizes, and replaces existing §9.102(b) and §9.104(c). This new section outlines the criteria the department will consider in determining whether to refer a contractor to the executive director for possible sanctions. Sections 9.104(a)(6) - (18) were added to provide additional information and clarification regarding department considerations in determining whether to refer a contractor to the executive director for possible sanctions. This new section provides additional clarification, protects the integrity of the competitive bid process, and ensures that only responsible bidders are eligible to bid on department highway improvement contracts. A contractor's failure to act, if an action is required, will also be considered in making a determination to refer a contractor to the executive director for possible sanctions.

New §9.105, Determinations Related to Sanction, reorganizes and replaces existing §9.104(a), (b), (f), and (g). This new section outlines the review and determination process regarding possible sanctions for a contractor referred to the executive director under new §9.104. Included as a consideration for imposing possible sanctions is the existence of, and adherence to, a compliance program as defined in new §9.101. The additional consideration of the existence of a contractor's internal compliance program in the determination of a sanction will serve to encourage industry use of such a program to prevent and detect noncompliance with applicable laws and procedures, and promote an industry culture that encourages ethical conduct and a

commitment to compliance with the law. No other substantive revisions were made from the existing rule.

New §9.106, Responsibility for Acts of Others, reorganizes and replaces existing §9.102(f) and states that the contractor is responsible for the conduct of others acting on its behalf. No substantial revisions from the existing rule were made.

New §9.107, Sanction Levels, reorganizes and replaces existing §9.105(b) and prescribes the various sanction levels that may be imposed on a contractor in those instances when the executive director has determined that a sanction will be imposed under §9.105. In determining the appropriate sanction level, the executive director will consider the existence of, and the contractor's adherence to, a compliance program as defined under new §9.100. Consideration of the existence of a contractor's internal compliance program in the application of a sanction will serve a dual purpose to encourage industry use of such a program to promote ethical behavior, and protect the integrity of the department's competitive bidding process. Under this new section, the maximum sanction level is limited to a debarment period of 60 months. This ensures that sanctions imposed by the department are applied consistently and uniformly. No other substantial revisions from the existing rule were made.

New §9.108, Application of Sanctions, reorganizes and replaces existing §9.104(e) and (f) and addresses the imposition of consecutive sanctions on a contractor determined to have committed multiple violations, and the executive director's discretion in imposing a sanction that is less than the maximum prescribed under new §9.107. No substantial revisions from the existing rule were made.

New §9.109, Notice of Sanctions, reorganizes and replaces existing §9.102(c) and provides for the content and requirements associated with the notice to a contractor of sanctions imposed by the department. No substantial revisions from the existing rule were made.

New §9.110, Suspension, reorganizes and replaces existing §9.105 and provides that the executive director may immediately suspend a contractor if it is determined that grounds for sanctions exist. This new section also outlines the requirements associated with the department's notice to a contractor of a suspension, which may be included in a sanctions notice. These notification requirements parallel those for sanctions and are necessary to ensure uniformity and consistency within the rule. While §9.105 addressed notification requirements associated with the application of sanctions, no notification requirements were listed for the application of a suspension. Suspensions will terminate once a final order is entered after a hearing or as ordered by the executive director. No other substantial revisions from the existing rule were made.

New §9.111, Contractual Obligations Unaffected, reorganizes and replaces existing §9.102(d) and states that the imposition of a sanction or suspension does not relieve a contractor's contractual obligations under an existing contract. No substantial revisions from the existing rule were made.

New §9.112, Opportunity for Informal Hearing, provides those contractors sanctioned at a Level 2 or greater the opportunity to appeal directly to the department. This new section prescribes the procedures associated with filing an appeal and scheduling an informal hearing with the department. The existing rule allowed only for the opportunity to appeal and schedule a formal administrative hearing in accordance with 43 TAC §1.21 et. seq. (relating to Procedures in Contested Cases). The department proposes this additional step in the appeals process as it recognizes the seriousness of the application of sanctions and desires to afford due process to affected contractors while also ensuring the maximum number of qualified bidders are eligible to bid on department highway improvement contracts. This additional department hearing process will also provide a more expeditious means of considering appeals associated with department sanctions and suspensions. If the executive director determines to continue a sanction, the contractor may request a formal hearing in accordance with new §9.114.

New §9.113, Informal Hearing on Indirect Sanction, provides an opportunity for an informal hearing for those contractors indirectly sanctioned due to an immediate family relationship to an affiliated entity upon which a sanction was directly imposed. This new section is similar to new §9.112 with the exception that the referenced hearing will involve only the consideration of the family connection associated with the affiliated entity. This additional hearing is necessary as the department recognizes that bidders who are indirectly sanctioned as affiliated entities only because of a family connection may be independent of the directly sanctioned firm. In such an instance, allowing the indirectly sanctioned contractor to be exempted from the sanction would better serve the department and public interests by providing increased competition on highway improvement contracts. As with the informal hearing provided in new §9.112, if the executive director determines to continue a sanction, the contractor may request a formal hearing in accordance with new §9.114.

New §9.114, Opportunity for Formal Hearing, replaces existing §9.103(a) and provides a contractor dissatisfied with an informal hearing associated with new §9.112 or §9.113 the opportunity to request a formal hearing in accordance with 43 TAC §1.21 et. seq. This new section requires that contractors wishing to appeal a department sanction or suspension first exhaust the appeals processes provided in new §9.112 and new §9.113 prior to filing an appeal with the State Office of Administrative Hearings. This is necessary to afford appealing contractors due process within the department and effectuate an appeals process that ensures the maximum number of qualified bidders are eligible to bid on highway improvement contracts, thereby increasing competition. The possibility of resolving an appeal within the department prior to a contractor filing an appeal with the State Office of Administrative Hearings will also provide a more effective use of available state resources.

New §9.115, Stay of Sanctions, reorganizes and replaces existing §9.103(b) and provides that an imposed sanction is stayed pending the outcome of an informal or formal hearing. This new section also addresses the conditions for the continuance and duration of an imposed sanction in those instances when a sanction is continued following an informal hearing and a formal hearing is not requested, or when a sanction is continued following a formal hearing. Other than providing necessary information concerning the application of a stay with regard to the informal hearings provided in new §9.112 and new §9.113, no substantial revisions were made from the existing rule.

New §9.116, List of Debarred or Suspended Contractors, outlines the procedures taken by the department in posting on the Internet a list of the names and known affiliates and principals of those contractors upon which a Level 2, 3, or 4 sanction has been imposed. The department is adding this provision for a list of debarred and suspended contractors to provide information to our customers regarding those contractors that are no longer eligible to bid on department highway improvement contracts due

to an imposed sanction or suspension. This posting also provides a more expeditious method to communicate the necessary information concerning department sanctioned and suspended contractors to affected local, state, and federal agencies.

New §9.117, Request for Review, outlines the procedures a sanctioned contractor may use to request that the executive director review the imposed sanction for modification. A contractor may submit no more than one review request during any 12-month period. This limitation helps ensure that reviews are conducted in an efficient manner without placing an undue and unnecessary burden on available department resources. The executive director may reduce, eliminate, or modify the imposed sanction. This serves a dual purpose of providing sanctioned contractors with a process to show their rehabilitation, while also serving the best interest of the public by ensuring the maximum number of contractors are eligible to bid on highway improvement contracts thereby increasing competition.

FISCAL NOTE

James Bass, Chief Financial Officer, has determined that for each of the first five years the repeals and new sections as proposed are in effect, there will be no fiscal implications for state or local governments as a result of enforcing or administering the repeals and new sections.

Thomas Bohuslav, Director, Construction Division, has certified that there will be no significant impact on local economies or overall employment as a result of enforcing or administering the repeals and new sections.

PUBLIC BENEFIT AND COST

Mr. Bohuslav has also determined that for each year of the first five years the sections are in effect, the public benefit anticipated as a result of enforcing or administering the repeals and new sections will be to further the department's mission to provide an efficient and fair process of administering contractor sanctions. There are no anticipated economic costs for persons required to comply with the sections as proposed. There will be no adverse economic effect on small businesses.

SUBMITTAL OF COMMENTS

Written comments on the proposed repeal of §§9.100 - 9.106 and new §§9.100 - 9.117 may be submitted to Thomas Bohuslav, Director, Construction Division, Texas Department of Transportation, 125 East 11th Street, Austin, Texas 78701-2483. The deadline for receipt of comments is 5:00 p.m. on October 13, 2008.

43 TAC §§9.100 - 9.106

(Editor's note: The text of the following sections proposed for repeal will not be published. The sections may be examined in the offices of the Texas Department of Transportation or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin.)

STATUTORY AUTHORITY

The repeals are proposed under Transportation Code, §201.101, which provides the Texas Transportation Commission with the authority to establish rules for the conduct of the work of the department.

CROSS REFERENCE TO STATUTE

None.

§9.100. Purpose.
§9.101. Definitions.
§9.102. Procedure.
§9.103. Opportunity for Hearing.
§9.104. Application of Sanctions.
§9.105. Suspension.
§9.106. Sanctions.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on August 29, 2008.

TRD-200804693
Bob Jackson
General Counsel
Texas Department of Transportation
Earliest possible date of adoption: October 12, 2008
For further information, please call: (512) 463-8683

43 TAC §§9.100 - 9.117

STATUTORY AUTHORITY

The new sections are proposed under Transportation Code, §201.101, which provides the Texas Transportation Commission with the authority to establish rules for the conduct of the work of the department.

CROSS REFERENCE TO STATUTE

None.

§9.100. Purpose.

It is the policy of the Texas Transportation Commission to protect the health, welfare, and safety of the traveling public and the state's substantial investment in its system of state highways. This policy requires procedures to ensure that only responsible contractors are eligible to bid on, enter, and subcontract under highway improvement contracts and that those contracts are fully performed in an efficient and timely manner.

§9.101. Definitions.

The following words and terms, when used in this subchapter, shall have the following meanings, unless the context clearly indicates otherwise.

(1) Bidding capacity--An amount calculated in accordance with §9.12 of this chapter (relating to Qualification of Bidders).

(2) Commission--The Texas Transportation Commission.

(3) Compliance Program--A written internal compliance and ethics program applicable to the contractor's organization. The program must be recognized as a qualifying compliance program by the department. At a minimum the program must provide compliance standards and procedures that employees and agents are expected to follow and must provide that:

(A) high-level personnel are responsible for oversight of compliance with the standards and procedures;

(B) appropriate care is being taken to avoid the delegation of substantial discretionary authority to individuals whom the organization knows, or should know, have a propensity to engage in illegal activities;

(C) compliance standards and procedures are effectively communicated to all of the organization's employees by

requiring them to participate in training and disseminating to them information that explains, in understandable language, the requirements of the program;

(D) the governing body or individuals of the organization have periodic training in ethics and in the compliance program;

(E) compliance standards and procedures are effectively communicated to all of the organization's agents;

(F) reasonable steps are being taken to achieve compliance with the compliance standards and procedures by:

(i) using monitoring and auditing systems that are designed to reasonably detect noncompliance; and

(ii) providing and publicizing a system for the organization's employees and agents to report suspected noncompliance without fear of retaliation;

(G) consistent enforcement of compliance standards and procedures is administered through appropriate disciplinary mechanisms;

(H) reasonable steps are being taken to respond appropriately to detected offenses and to prevent future similar offenses; and

(I) the organization has a written employee code of conduct that, at a minimum, addresses:

(i) record retention;

(ii) fraud;

(iii) equal opportunity employment;

(iv) sexual harassment and sexual misconduct;

(v) conflicts of interest;

(vi) personal use of the organization's property; and

(vii) gifts and honoraria.

(4) Contractor--An entity that is eligible to bid on a highway improvement contract or that functions or seeks to function as a subcontractor under a highway improvement contract or as a supplier of materials or equipment to be used in the construction or maintenance of a part of the state highway system. The term includes an affiliated entity of a contractor, as described by §9.12(d) of this chapter (relating to Qualification of Bidders).

(5) Debarment--Disqualification of a contractor from bidding on or entering into a highway improvement contract, from participating as a subcontractor under a highway improvement contract, and from participating as a supplier of materials or equipment to be used in the construction or maintenance of a part of the state highway system.

(6) Executive director--The executive director of the Texas Department of Transportation or the director's designee not below the level of division director.

(7) Highway improvement contract--A contract entered under Transportation Code, Chapter 223, Subchapter A for the construction, reconstruction, or maintenance of a segment of the state highway system, or for the construction or maintenance of a building or other facility appurtenant to a building.

(8) Sanction--Debarment or reduction in bidding capacity.

(9) Suspension--Immediate, temporary disqualification of a contractor from bidding on or entering into a highway improvement contract, from participating as a subcontractor under a highway improvement contract, and from participating as a supplier of materials or equipment to be used in the construction or maintenance of a part of the state highway system. Suspension differs from a sanction involving debarment as it may take effect prior to and during a hearing.

§9.102. Grounds for Sanctions.

The executive director may sanction a contractor for:

(1) a conviction of, a plea of guilty or nolo contendere to a charge of, or a civil judgment or a public admission by the contractor or an individual or entity that acted on behalf of the contractor related to:

(A) fraud or other criminal offense in connection with obtaining, attempting to obtain, or performing a public agreement or transaction;

(B) the violation of a federal or state antitrust statute, including a statute that proscribes price fixing between competitors, allocation of customers between competitors, or bid rigging; or

(C) embezzlement, theft, forgery, bribery, falsification or destruction of records, making false statements, tax evasion, receiving stolen property, making false claims, or obstruction of justice;

(2) any other offense indicating a lack of business integrity or business honesty that seriously and directly affects the contractor's responsibility, if the executive director has probable cause to believe that the offense has been committed;

(3) the contractor's disqualification by the comptroller, another state, or an agency of the federal government for any of the reasons listed in this section;

(4) failure to execute a highway improvement contract after a bid is awarded, unless the contractor honors a bid guaranty submitted under §9.14(c) of this chapter (relating to Submittal of Bid);

(5) the rejection by the commission of two or more bids by the contractor during the 36-month period preceding the month in which the determination is being made because of contractor error;

(6) failure of the contractor to notify the department promptly of a conviction of a crime related to bidding or debarment for any reason by the comptroller, another state, or an agency of the federal government; or

(7) the contractor's declaration of default on a highway improvement contract.

§9.103. Notification of Rules.

The department will send a copy of this subchapter to each prequalified contractor. The department's failure to comply with this section does not affect the applicability of this subchapter.

§9.104. Referral to Executive Director.

(a) Considerations for referral. In determining whether to refer a contractor to the executive director for possible sanctions for the contractor's actions, the department may consider:

(1) the contractor's involvement in planning, initiating, or carrying out the actions or involvement in the failure to act;

(2) whether, in light of all facts and circumstances, a lengthy debarment is necessary to protect the interest of the state;

(3) restitution paid by the contractor or a third party for damages suffered by a governmental entity as a result of the contractor's actions or failure to act;

(4) cooperation by the contractor with a governmental entity in the investigation of the contractor's actions or failure to act, including the provision of a full and complete account of the contractor's involvement;

(5) the contractor's dissociation from individuals and firms that have been involved with the actions or failure to act;

(6) the actual or potential harm or impact resulting from the contractor's actions or failure to act;

(7) the frequency or duration of the incidents related to the actions;

(8) any history or pattern of related offenses by the contractor;

(9) the contractor's exclusion or disqualification by the federal government or another state;

(10) whether the contractor recognizes the seriousness of its actions and has accepted responsibility for the actions;

(11) whether the actions were pervasive within the contractor's organization;

(12) the positions held by the persons involved in the actions;

(13) whether the contractor's organization took appropriate corrective action or remedial actions to prevent recurrence;

(14) whether the principals of the organization tolerated the actions;

(15) whether the contractor brought the actions to the attention of the appropriate government agency in a timely manner;

(16) whether effective standards of conduct and internal controls were in place at the time the act occurred;

(17) any appropriate disciplinary actions taken against those individuals responsible for the actions; and

(18) any other factors appropriate to the circumstances of a particular case.

(b) Failure to act. For purposes of this section, "action" includes the failure to act if action is required.

§9.105. Determinations Related to Sanction.

(a) Determination of existence of grounds. If the contractor's actions are referred to the executive director, the executive director will determine whether a ground for sanctioning the contractor listed by §9.102 of this subchapter (relating to Grounds for Sanctions) exists.

(b) Determination to sanction. If the executive director determines that one or more grounds for sanctioning the contractor exist, the executive director will determine whether or not to impose sanctions against the contractor. In making that determination, the executive director will consider:

(1) the seriousness of a contractor's actions or failure to act and the circumstances giving rise to those actions or failures;

(2) the existence of, and adherence to, a compliance program, and whether the program compliance officer has the authority to implement the program effectively; and

(3) any other mitigating circumstances.

(c) Agreed modification of procedure. The procedure for considering a sanction may be modified by an agreement between the executive director and the contractor.

§9.106. Responsibility for Acts of Others.

The conduct of an individual or entity acting on behalf of a contractor may be imputed to the contractor.

§9.107. Sanction Levels.

(a) If the executive director determines to impose a sanction on a contractor under §9.105 of this subchapter (relating to Determinations Related to Sanction), the executive director will determine which of the following sanction levels is to be applied:

(1) Level 1--A 50% reduction in bidding capacity for no more than 12 months.

(2) Level 2--Debarment of the contractor for no more than 12 months.

(3) Level 3--Debarment of the contractor for no more than 36 months.

(4) Level 4--Debarment of the contractor for no more than 60 months.

(b) In determining the appropriate sanction level, the executive director will consider the existence of, and the contractor's adherence to, a compliance program, and whether the contractor's program compliance officer has the authority to effectively implement the program.

(c) If a contractor is debarred on the ground provided by §9.102(3) of this subchapter (relating to Grounds for Sanctions), the period of the debarment may not exceed the period of disqualification established by the state or federal agency on which the debarment is based.

§9.108. Application of Sanctions.

(a) Consecutive sanctions. In the case of multiple actions or failures by a contractor arising out of separate occurrences, the executive director may impose multiple sanctions consecutively and in any order.

(b) Imposition of lesser sanctions. When applying a level of sanctions provided by §9.107 of this subchapter (related to Sanction Levels), the executive director may impose a sanction that is less than the maximum sanction for that level. For example, the bidding capacity may be reduced by a lesser percentage than the percentage provided for Level 1, or a reduction in bidding capacity of any amount may be ordered for any length of time for Level 2, 3, or 4.

§9.109. Notice of Sanctions.

(a) Notification. The department will notify a contractor of a sanction by certified mail within five calendar days after the executive director's decision to impose the sanction.

(b) Contents. The notice will give the general reasons for the sanction, summarize the facts and circumstances underlying the sanction, identify the effective date and period of the sanction, and, if applicable, state that the contractor may request a hearing within 10 days after the date of receiving the notice of the sanction.

(c) Effective date. Except as provided in §9.115 of this subchapter (relating to Stay of Sanctions), a sanction is effective on the date specified in the notice.

§9.110. Suspension.

(a) The executive director may immediately suspend a contractor under this section if the executive director determines that grounds for a sanction exist under §9.102 of this subchapter (relating to Grounds for Sanctions).

(b) Notice of suspension. The department will notify a contractor of a suspension by certified mail within five calendar days after the executive director's decision to suspend the contractor. The notice will:

(1) give the general reasons for the suspension;

(2) summarize the facts and circumstances underlying the suspension;

(3) identify the effective date of the suspension; and

(4) state that the contractor may petition in writing for an informal hearing within 10 days after the date of receiving the notice of the suspension.

(c) Inclusion in sanction notice. The notice of suspension may be included in a sanction notice under §9.109 of this subchapter (relating to Notice of Sanctions).

(d) Duration. A suspension will terminate when a final order is entered after a hearing or when ordered by the executive director.

§9.111. Contractual Obligations Unaffected.

The imposition of a sanction or suspension does not affect a contractor's contractual obligations or limit the commission's contractual remedies.

§9.112. Opportunity for Informal Hearing.

(a) A contractor that is sanctioned at a Level 2 or greater, or suspended, may request an informal hearing on the sanction or suspension. The request must be in writing and received by the department within 10 days after the date the contractor receives notice of the sanction or suspension. For the purpose of requesting a hearing, a notice of sanction or suspension is presumed to be received by the contractor on the third business day after the date on which it is mailed by the department.

(b) Not later than the 30th day after the date of receipt of the written request, the executive director will hold an informal hearing with the contractor to discuss the sanction or suspension.

(c) The contractor will be given the opportunity to present evidence at the hearing to demonstrate that not imposing the sanction or suspension is in the best interest of the state.

(d) The executive director will consider the evidence presented and inform the contractor in writing within 30 days of the informal hearing of the final determination to continue, modify, or end the sanction or suspension.

(e) If the executive director determines to continue a sanction, the contractor may request a formal hearing under §9.114 of this subchapter (relating to Opportunity for Formal Hearing).

§9.113. Informal Hearing on Indirect Sanction.

(a) An entity may petition the executive director for an informal hearing on the imposition of a sanction or suspension that is indirectly imposed on the entity solely because of a family relationship with another entity on which the sanction or suspension was directly imposed.

(b) Not later than the 30th day after the date of receipt of the written request, the executive director will hold an informal hearing with the entity to discuss the family relationship associated with the affiliation.

(c) Within 15 days after the date the informal hearing is held, the department will conduct a review to determine the affiliation of the entities.

(1) The review will include, but is not limited to, consideration of the entities':

(A) intercompany transactions;

(B) equipment;

(C) personnel;

(D) office space;

(E) finances; and

(F) other affiliation criteria.

(2) For purposes of this section, two entities are affiliated if one of the entities was formed after the sanction or suspension of the other entity and has the same or similar management, ownership, or principal employees as the sanctioned or suspended entity.

(d) The executive director will consider the evidence presented and inform the entity in writing within 30 days of the informal hearing of the final determination to continue or lift the indirect sanction or suspension.

(e) The executive director may grant an exception to the indirect sanction only if the department finds that the operations and control of an entity affected by an indirect sanction are independent from the directly sanctioned entity.

(f) The granting of a sanction or suspension exception does not remove the affiliation classification between the affected business entities.

(g) The department may conduct follow-up reviews and revoke the exception if the department determines that the affiliated entities are no longer independent.

(h) If the executive director does not grant an exception and determines to continue an indirect sanction or suspension, the entity may request a formal hearing under §9.114 of this subchapter (relating to Opportunity for Formal Hearing).

§9.114. Opportunity for Formal Hearing.

(a) If the contractor is dissatisfied with the decision following an informal hearing under §9.112 of this subchapter (relating to Opportunity for Informal Hearing) or §9.113 of this subchapter (relating to Informal Hearing on Indirect Sanction), the contractor may request an administrative hearing under §1.21 et seq. of this title (relating to Procedures in Contested Cases).

(b) The request must be received by the executive director within 10 days after the date that the contractor receives notice of the determination under §9.112(d) of this subchapter or §9.113(d) of this subchapter.

§9.115. Stay of Sanctions.

(a) A sanction is automatically stayed from the date a petition for an informal hearing is received until the date the decision is made following the informal hearing, or from the date a request for a formal hearing is received until the date a final order is entered by the commission.

(b) If a formal hearing is not requested following an informal hearing, the full term of the sanction will be reinstated on the date of the entry of a decision to continue the sanction as if the sanction were first imposed on that date.

(c) If a formal hearing is requested, the full term of the sanction will be reinstated on the date of the entry of a final decision imposing the sanction or the date the hearing request is dismissed as if the sanction were first imposed on that date unless the commission specifically orders that a lesser sanction be imposed.

§9.116. List of Debarred or Suspended Contractors.

(a) To inform non-sanctioned contractors and local governments of the contractors that are ineligible to participate in department contracts, the department will post on the department's Internet site a list of names of the contractors and their known affiliates and principals on which a Level 2, Level 3, or Level 4 sanction has been imposed.

(b) The department will update the posting after the later of the time of:

(1) the determination under §9.105 of this subchapter (relating to Determinations Related to Sanction);

(2) the determination under §9.112 of this subchapter (relating to Opportunity for Informal Hearing) or §9.113 of this subchapter (relating to Informal Hearing on Indirect Sanction) if an informal hearing is timely requested; or

(3) the commission's final order if a formal hearing is timely requested.

(c) The department will update the posting immediately after the executive director suspends a contractor under §9.110 of this subchapter (relating to Suspension).

§9.117. Request for Review.

(a) A sanctioned contractor may send a written request to the executive director to review an imposed sanction for modification. The request must provide new evidence supporting the request for review.

(b) The executive director will not consider more than one request under this section relating to a sanction during any 12-month period.

(c) The executive director will review the evidence provided in the contractor's written review request and inform the contractor in writing of the final determination on the modification of the sanction.

(d) If the executive director determines that modification of the sanction is in the public interest, the executive director may reduce or eliminate the imposed sanction.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on August 29, 2008.

TRD-200804694
Bob Jackson
General Counsel
Texas Department of Transportation
Earliest possible date of adoption: October 12, 2008
For further information, please call: (512) 463-8683

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CHAPTER 21. RIGHT OF WAY

The Texas Department of Transportation (department) proposes amendments to §21.31, Definitions, §21.35, Exceptions, §21.37, Design, §21.38, Construction and Maintenance, §21.39, Ownership/Abandonment/Idling, §21.40, Underground Utilities, §21.52, Forms--General, §21.53, Use and Occupancy Agreement Forms, §21.54, Notice Forms, §21.55, Abandoned Interests, §21.902, Definitions, and §21.905, Requests, all concerning utility accommodation on the state highway system and state railroads.

EXPLANATION OF PROPOSED AMENDMENTS

Title 43 TAC Chapter 21, Subchapter C, Utility Accommodation, was adopted in 1976 to prescribe minimum requirements for the accommodation, method, materials, and location for the installation, adjustment, and maintenance of public and private utilities within the right of way of the state highway system. Some of the provisions in the subchapter use terminology that is currently outdated and contain procedures that imply certain obligations but are not specific. The proposed amendments are necessary to clarify existing language, to maintain consistency between federal and state regulations, to better reflect current practice, and to update standards to implement the intent of the rules. Similarly, there are changes to Subchapter O, Utility Accommodation for Rail Facilities that are necessary to maintain consistency in treatment of utilities in both highway and railroad rights of way.

The amendment to §21.31(2) changes the definition of "abandoned utility" to be more general and to meet the common understanding of abandonment as being the result of both actual non-use and the utility owner's intent. The requirements that the utility owner first request an abandonment in place and then obtain the department's approval are deleted.

A definition of "joint use agreement" is added as new §21.31(30). There is no current definition for this term or for "use and occupancy agreement," and use of these and other similar terms to describe required forms in different provisions in this subchapter creates potential conflict and confusion. The definition of a "joint use agreement" is limited to a type of "use and occupancy agreement" that is used only for situations in which the utility has a compensable interest in the land occupied by its facilities. The definition is consistent with federal regulation 23 C.F.R. §645.209(i). The remaining definitions in §21.31 are renumbered.

A definition of "use and occupancy agreement" is added as new §21.31(45). There is no current definition for this term or for "joint use agreement," and use of these and other similar terms to describe required forms in different provisions in this subchapter creates potential conflict and confusion. The definition of a "use and occupancy agreement" includes all documents by which the department approves the use of highway right of way by utility facilities. The definition is consistent with federal regulations 23 C.F.R. §§645.105, 645.203, 645.207, and 645.213.

The words "pipelines, conduits, cables," are added to the descriptive list of "lines" in the definition of "utility facilities" in §21.31(48). This addition clarifies that all types and variations of lines, as those words are used in other sections of this subchapter to describe utility facilities, are included in the definition.

The word "facility" is added after the word "utility" in the definition of "utility structure" in §21.31(50). The word was mistakenly omitted in the original text and its addition clarifies the meaning.

Amendments to §21.35(a)(2) delete the phrase "Utility Installation Request form or any other instrument" and replace it with the newly defined general term "use and occupancy agreement." A "Utility Installation Request" is the current name for a particular type of use and occupancy agreement that has been re-named several times in the past. One of the prior names for the same kind of agreement ("notice") appears in various locations in this subchapter. The change to §21.35(a)(2) brings consistency to the use of the term and avoids confusion in the event of future name changes for the form.

Amendments to §21.37(d)(2) delete the term "utility installation request" and replace it with the newly defined general term "use and occupancy agreement." A "utility installation request" is the current name for a particular type of use and occupancy agreement that has been re-named several times in the past. One of the prior names for the same kind of agreement ("notice") appears in various locations in this subchapter. The change to this §21.37(d)(2) brings consistency to the use of the term and avoids confusion in the event of future name changes for the form.

Amendments to §21.38(d)(1) delete the phrase "Utility Joint Use Acknowledgement or Utility Installation Request" and replaces it with the newly defined general term "use and occupancy agreement." The existing terms are specific names for two forms that together are intended to cover all types of use and occupancy agreements. The change to the new general term will clearly cover all types of these agreements and avoids confusion in the event of future name changes for either or both forms.

The title of §21.39 is updated to more completely describe the nature of the section. Subsection (a) of §21.39 is deleted. This provision dealing with the department's acquisition of a utility's abandoned real property interest is already included in §21.55. Section 21.39 deals primarily with the abandonment of utility facilities rather than real property interests and the provision is more appropriately located in §21.55.

New §21.39(a), clarifies that the new owner of a utility facility must provide the owner's name to the department, and requires the new owner to acknowledge whether it is a public utility. Only public utilities (as currently defined in §21.31(37)) have the right under §21.36 to place utility facilities longitudinally on highway rights of way. The additional information required by this amendment will enable the department to better monitor use of its right of way.

New §21.39(b) requires a utility to submit a request for a new use and occupancy agreement if it wishes to materially change the character, use, or function of an existing approved utility facility. Requirements for the accommodation, method, materials, and location of utility facilities vary depending on their use. For example, the requirements for a high pressure gas line are more stringent than low pressure lines because of the increased safety risk. It is critical for the department to be aware of any change in use and be able to ensure that the new use complies with the appropriate accommodation requirements.

New §21.39(c)(1) adds a requirement that a utility provide written notice to the department if it abandons or idles a utility facility, and in the case of abandonment, indicate whether the facility will be removed or abandoned in place. Although this step was implied in the current rule dealing with abandonment in place, the amendment clarifies the process. The remaining paragraphs under this subsection (c) are renumbered.

New §21.39(c)(3) clarifies that the department will pay the costs of removing an abandoned line if the removal is caused by an active highway project and the adjustment costs are otherwise eligible for reimbursement.

The amendments to new §21.39(c)(5) and (6) merely add descriptive words that clarify the scope of the current provisions.

The words "and handholds" are deleted in the title to §21.40(a)(3) because there is no discussion of handholds or handholes in the paragraph.

Amendments to §21.40(f)(2)(D)(i) delete the term "utility installation request" and replace it with the newly defined general term "use and occupancy agreement." A "utility installation request" is the current name for a particular type of use and occupancy agreement that has been re-named several times in the past. One of the prior names for the same kind of agreement ("notice") appears in various locations in the subchapter. The change to §21.40(f)(2)(D)(i) brings consistency to the use of the term and avoids confusion in the event of future name changes for the form.

Amendments to §21.52 delete the term "notice forms." It is a prior name for the currently named "utility installation request" and is duplicative of the existing term "use and occupancy agreement." The change to this §21.52 brings consistency to the use of the term "use and occupancy agreement" and avoids confusion in the event of future name changes for the forms. The amendments also replace the word "provided" with "required" to clarify that a use and occupancy agreement is mandatory for all utility facilities installed, adjusted, relocated, or retained within the highway right of way, and delete the hyphen between the words "right of way" to be consistent with other provisions of this subchapter in which the words right of way are used.

Amendments to §21.53 limit the use of "joint use agreements" to situations in which the utility has a prior property interest which is being retained within the highway right of way. This is consistent with federal regulation 23 C.F.R. §645.209(i). The amendment also clarifies that the form should contain utility location plans. This is consistent with current language for other use and occupancy agreements described in §21.54 and is also consistent with existing practice.

Amendments to §21.54 replace the term "notice forms" with the newly defined general term "use and occupancy agreement." A "notice form" is the prior name used for a particular type of use and occupancy agreement that is currently named "Utility Installation Request." The change to "use and occupancy agreement" brings consistency to the use of the term and avoids confusion in the event of future name changes for the form. This amendment, together with changes to the definitions in §21.31 and the limited use of "joint use agreements" in §21.53, also changes the department's existing practice of using a joint use agreement in more situations than just when the utility has a prior property interest which is being retained within the highway right of way. The existing practice requires a utility to sign a joint use agreement when its utility facility is adjusted, relocated, or retained in connection with active highway projects - even though the utility may not have a prior property interest. The new policy adopted by this amendment would use the more general "use and occupancy agreement" in all situations except when the utility has a prior property interest. The changes to use of these forms is consistent with federal regulations 23 C.F.R. §§645.105, 645.203, 645.207, 645.209, and 645.213.

Amendments to §21.55 delete the hyphen between the words "right of way" to be consistent with other provisions of this subchapter in which the words "right of way" are used.

New §21.902(21) adds a definition of "joint use agreement." There is no current definition for this term or for "use and occupancy agreement," and use of these terms in this subchapter creates potential conflict and confusion. The definition of a "joint use agreement" is limited to a type of "use and occupancy agreement" that is used only for situations in which the utility has a compensable interest in the land occupied by its facilities. The definition is consistent with treatment of utilities in Subchapter C dealing with Utility Accommodation for highways. The remaining definitions in §21.902 are renumbered.

New §21.902(30) adds a definition of "use and occupancy agreement." There is no current definition for this term or for "joint use agreement," and use of these terms in this subchapter creates potential conflict and confusion. The definition of a "use and occupancy agreement" includes all documents by which the department approves the use of railroad right of way by utility facilities. The definition is consistent with treatment of utilities in Subchapter C dealing with Utility Accommodation for highways.

Amendments to §21.905 replace the term "joint-use agreement" with the newly defined general term "use and occupancy agreement." It then describes that a joint use agreement should be used in situations when the utility has a prior property interest which is being retained in the railroad right of way. The amendment also incorporates a requirement that the forms include such terms, conditions, and utility location plans as necessary to protect and preserve the railroad and the safety of its use. All of these changes are designed to make treatment of utilities in railroad right of way consistent with treatment of utilities in Subchapter C dealing with Utility Accommodation for highways. Finally, the amendments add a requirement that the utility provide written notice of any material change in the character, use, or function of the utility facility. Requirements for the accommodation, method, materials, and location of utility facilities vary depending on their use. For example, the requirements for a high pressure gas line are more stringent than low pressure lines because of the increased safety risk. It is critical for the department to be aware of any change in use and be able to ensure that the new use complies with the appropriate accommodation requirements.

FISCAL NOTE

James Bass, Chief Financial Officer, has determined that for each of the first five years the amendments as proposed are in effect, there will be no fiscal implications for state or local governments as a result of enforcing or administering the amendments.

John Campbell, Director, Right of Way Division has certified that there will be no significant impact on local economies or overall employment as a result of enforcing or administering the amendments.

PUBLIC BENEFIT AND COST

Mr. Campbell has also determined that for each year of the first five years the sections are in effect, the public benefit anticipated as a result of enforcing or administering the amendments will be improved administration of the utility program. There are no anticipated economic costs for persons required to comply with the sections as proposed. There will be no adverse economic effect on small businesses.

Written comments on the proposed amendments to §§21.31, 21.35, 21.37 - 21.40, 21.52 - 21.55, 21.902, and 21.905 may be submitted to John Campbell, Director, Right of Way Division, Texas Department of Transportation, 125 East 11th Street, Austin, Texas 78701-2483. The deadline for receipt of comments is 5:00 p.m. on October 13, 2008.

SUBCHAPTER C. UTILITY ACCOMMODATION

43 TAC §§21.31, 21.35, 21.37 - 21.40, 21.52 - 21.55

STATUTORY AUTHORITY

The amendments are proposed under Transportation Code, §201.101, which provides the Texas Transportation Commission with the authority to establish rules for the conduct of the work of the department, and more specifically, Transportation Code, §203.095, which directs the department to adopt rules to implement Transportation Code, Chapter 203, Subchapter E concerning relocation of utility facilities required by improvements of the state highway system, and Transportation Code, §91.003, which directs the department to adopt rules to implement Transportation Code, Chapter 91 concerning the development, operation, and maintenance of a rail facility.

CROSS REFERENCE TO STATUTE

Transportation Code, Chapter 91, Subchapter F, and Transportation Code, Chapter 203, Subchapter E.

§21.31. Definitions.

The following words and terms, when used in this subchapter, shall have the following meanings, unless the context clearly indicates otherwise.

(1) (No change.)

(2) Abandoned utility--A utility facility[~~:~~]

[~~(A)~~] that no longer carries a product or performs a function and for which the owner:

(A) does not plan to use in future operations; or

(B) is unknown or cannot be located.[~~; or~~]

[~~(B) whose owner has requested abandonment and the abandonment has been approved by the district.~~]

(3) - (11) (No change.)

(12) Controlled access highway--A highway so designated by the commission on which owners or occupants of abutting lands and other persons are denied access to or from the highway mainlanes [~~main lanes~~].

(13) - (29) (No change.)

(30) Joint use agreement--A use and occupancy agreement that describes the obligations, responsibilities, rights, and privileges vested in the department and retained by the utility, and used for situations in which the utility has a compensable interest in the land occupied by its facilities and the land is to be jointly occupied and used for highway and utility purposes.

(31) [~~(30)~~] Low-pressure gas or liquid petroleum lines--Gas or liquid petroleum pipelines that are operated at a pressure not exceeding 60 pounds per square inch.

(32) [~~(31)~~] Mainlanes [~~Main lanes~~]--The traveled way of a freeway or controlled access highway that carries through traffic.

(33) [~~(32)~~] Maintenance Division--The administrative office of the department responsible for the maintenance and operation of the state highway system.

(34) [~~(33)~~] Noncontrolled access highway--A highway on which owners or occupants of abutting lands or other persons have direct access to or from the mainlanes [~~main lanes~~] by department permit.

(35) [~~(34)~~] Outer separation--The area between the mainlanes [~~main lanes~~] of a highway for through traffic and a frontage road.

(36) [~~(35)~~] Pavement structure--The combination of the surface, base course, and subbase.

(37) [~~(36)~~] Private utility--Any utility facility, its accessories, and appurtenances, including gathering lines devoted exclusively to private use.

(38) [~~(37)~~] Public utility--A person, firm, corporation, river authority, municipality, or other political subdivision engaged in the business of transporting or distributing a utility product for public consumption.

(39) [~~(38)~~] Ramp terminus--The entrance or exit portion of a controlled access highway ramp adjacent to the through traveled lanes.

(40) [~~(39)~~] Right of Way Division (ROW)--The administrative office of the department responsible for the acquisition and management of the state right of way.

(41) [~~(40)~~] Riprap--An appurtenance placed on the exposed surfaces of soils to prevent erosion, including a cast-in-place layer of concrete or stones placed together.

(42) [~~(41)~~] Service line--A utility facility that conveys electricity, gas, water, or telecommunication services from a main or conduit located in the right of way to a meter or other measuring device that services a customer or to the outside wall of a structure, whichever is applicable and nearer the right of way.

(43) [~~(42)~~] TMUTCD--The most recent edition of Texas Manual on Uniform Traffic Control Devices for Streets and Highways.

(44) [~~(43)~~] Transmission line--That part of a utility system connecting a main energy or material source with a distribution system.

(45) Use and occupancy agreement--The written document, whether in the form of an agreement, acknowledgment, notice, or request, by which the department approves the use and occupancy of highway right of way by utility facilities.

(46) [~~(44)~~] Utility--Any entity owning a public or private utility.

(47) [~~(45)~~] Utility appurtenances--Any attachments or integral parts of a utility facility, including fire hydrants, valves, and gas regulators.

(48) [~~(46)~~] Utility facilities--All lines, pipelines, conduits, cables, and their appurtenances within the highway right of way except those for highway-oriented needs, including underground, surface, or overhead facilities either singularly or in combination, which may be transmission, distribution, service, or gathering lines.

(49) [~~(47)~~] Utility strip--The area of land established within a control of access highway, located longitudinally within the border width, where an assignment may be designated for a utility delineating the area of use, occupancy, and access.

(50) [~~(48)~~] Utility structure--A pole, bridge, tower, or other aboveground structure on which a conduit, line, pipeline, or other utility facility is attached.

§21.35. Exceptions.

(a) Exceptions to any provisions contained in these sections and relating to utility accommodation shall be justified and recommended for approval by the district engineer and authorized by:

(1) (No change.)

(2) the Maintenance Division Director, when a use and occupancy agreement, [~~Utility Installation Request form or any instrument~~] other than a utility joint use agreement, is received for a proposed utility installation on an existing highway.

(b) (No change.)

(c) For each request for exception the utility must clearly demonstrate that:

(1) (No change.)

(2) the accommodation will not be constructed or serviced by direct access from the mainlanes [~~main lanes~~] of a freeway or connecting ramps;

(3) - (4) (No change.)

§21.37. Design.

(a) (No change.)

(b) Location.

(1) - (5) (No change.)

(6) Utilities on controlled access highways or freeways shall be located to permit maintenance of the utility by access from frontage roads, nearby or adjacent roads and streets, or trails along or near the right of way line without access from the mainlanes [~~main lanes~~] or ramps. Utilities shall not be located longitudinally in the center median or outer separation of controlled access highways or freeways.

(7) - (8) (No change.)

(c) (No change.)

(d) Tunnels and bridges.

(1) (No change.)

(2) Non-interstate highways. If a utility's line exists on its own easement and it would be more economical to the department to adjust the line across a highway by use of a utility tunnel or bridge rather than to provide separately trenched and cased crossing, consideration should be given to provision of such a structure. Where the utility line was placed through an approved use and occupancy agreement [~~utility installation request~~] and the adjustment of the utility is the sole responsibility of the utility owner, the department may allow for the provision of a utility structure without cost to the department, provided the conditions outlined in subsection (a) of this section and all other pertinent requirements are met. If a structure is to serve as a joint utility/pedestrian crossing or a joint utility/sign support structure, the department will participate to the extent necessary for accommodation of pedestrians or highway signs only.

(e) Joint use of utility and highway structures.

(1) (No change.)

(2) Where other arrangements for a utility line to span an obstruction are not feasible, the utility may submit a request to the district for attachment of the line to a bridge structure through a bridge attachment agreement. Each attachment will be considered on an individual basis, and permission to attach will not be considered as establishing a precedent for granting of subsequent requests for attachment.

(A) - (E) (No change.)

(F) A utility requesting permission to attach a pipeline to an existing bridge shall submit sufficient information to allow the department to conduct a stress analysis to determine the effect of the added load on the structure. The department may require other details of the proposed attachment as they affect safety and maintenance.

(f) (No change.)

§21.38. Construction and Maintenance.

(a) - (c) (No change.)

(d) Work restrictions.

(1) The department reserves the right to halt construction or maintenance during hazardous situations, such as inclement weather, peak traffic hours, special events, or holidays, or for non-compliance with a use and occupancy agreement [~~Utility Joint Use Acknowledgement or Utility Installation Request~~]. Requests for emergency maintenance shall be directed to the appropriate district office.

(2) (No change.)

§21.39. Ownership, Function, Abandonment, and Idling of Facilities [~~Ownership/Abandonment/Idling~~].

[(a) General. When, due to a highway construction project, a utility is required to relocate its facility from property in which it owns a property interest, the department will acquire the utility's abandoned property interest within the new highway right of way.]

(a) [(b)] Change of ownership [or function]. If a utility sells, assigns, or conveys its facility to another company, the new owner must, within a reasonable period of time, notify the department of the sale in writing and: [within a reasonable period of time and]

(1) provide the name, address, and phone number of the new owner and a person to be contacted on matters concerning the utility facility; [, and must]

(2) acknowledge whether the new owner is a public utility; and

(3) update all call signs and markers [within a reasonable period of time].

(b) Change of function. If a utility wishes to materially change the character, use, or function of an approved utility facility, the utility must submit to the department a written request for a new use and occupancy agreement and otherwise comply with the requirements contained in this subchapter concerning utility accommodation.

(c) Abandonment or idling of facility.

(1) Notice. If a utility abandons or idles a utility facility, it must, within a reasonable period of time, notify the department of that status in writing and in the case of abandonment, indicate whether the facility will be removed or abandoned in place.

(2) [(1)] Abandonment in place.

(A) A utility that wishes to abandon a utility facility in place must submit a written request to the district engineer for each type of facility. The request must include the following detailed information for each facility proposed for abandonment:

(i) offsets from property lines and the centerline of the highway;

(ii) coordinates based on the global positioning system (GPS) or a survey datum as directed by the department;

(iii) the age, condition, material type, current status, quantity, and size of the facility;

(iv) a legend explaining symbols, characters, abbreviations, scale, and other data shown on any as-built drawing or record mapping;

(v) a statement certifying that the facility does not contain, or is not composed of, hazardous or contaminated materials; and

(vi) any additional information requested by the department.

(B) If the district engineer approves the abandonment in place, the utility facility owner shall continue to map, locate, and mark its abandoned facilities as required by this subchapter, federal regulations, or standards adopted by industry organizations, whichever is more restrictive.

(C) Abandonment shall not be construed as a change in ownership of the facility.

(3) [(2)] Abandonment costs and restoration of public right of way. The utility shall be responsible for all costs associated with the maintenance or removal of its abandoned or idled lines within the right of way, unless removal [adjustment] of the line is caused by an active highway project and adjustment is the financial responsibility of the department.

(4) [(3)] Voids. Significant voids beneath the right of way are prohibited. The department, at the discretion of the district engineer, may require that a facility be filled with cement slurry or backfilled in accordance with department standards.

(5) [(4)] High and low pressure gas pipeline abandonment. Each owner/operator shall conduct abandonment or deactivation of gas pipelines within the right of way in compliance with the requirements of this section, current federal, state, or local laws or codes, or industry standards, whichever are more stringent. If the line is approved for abandonment in place, the utility shall:

(A) purge, cut, and cap or plug the ends of all facilities at the right of way lines;

(B) submit to the department a written certification that the abandonment conforms with all requirements of this section, current federal, state, or local laws or codes, or industry standards, whichever are more stringent;

(C) slurry-fill the facility, if the department determines it is needed due to the age, condition, material type, quantity, and size of the facility; and

(D) disconnect each pipeline from all sources and supplies of gas, purge each pipeline of gas and, in the case of submerged pipelines, fill each pipeline with water or other approved materials, and seal it at the ends.

(6) [(5)] Abandoned gas service lines [or lines not in use]. For each gas service line approved for abandonment in place, the utility shall:

(A) provide a locking device or other means designed to prevent opening on each valve that is closed, to prevent the flow of gas to the customer;

(B) install in the service line or in the meter assembly a mechanical device or fitting that will prevent the flow of gas;

(C) physically disconnect the customer's piping from the gas supply and seal the open pipe ends;

(D) insure that a combustible mixture is not present after purging; and

(E) fill each abandoned vault with a suitable compacted material.

(7) [(6)] Record keeping for abandoned facilities. A record of underground utility facilities abandoned in the right of way shall be maintained in a utility's permanent files until the facility is completely removed from the ground, and shall be provided to the department promptly upon request. This record must include:

(A) offsets from property lines and the centerline of the right of way;

(B) coordinates derived from the global positioning system being used by the department or a survey datum as directed by the department;

(C) the type, quantity, and size of the equipment;

(D) a legend explaining symbols, characters, abbreviations, scale, and other data shown on map;

(E) the location of the abandoned facilities; and

(F) any additional information requested by the department.

§21.40. Underground Utilities.

(a) General.

(1) - (2) (No change.)

(3) Manholes [~~and handholds~~].

(A) - (E) (No change.)

(4) Installation.

(A) (No change.)

(B) For rural, uncurbed highway crossings, all borings shall extend beneath all travel lanes. Unless precluded by right of way limitations, the following clearances are required for rural highway crossings:

(i) 30 feet from all freeway mainlanes [~~main lanes~~] and other high-speed (exceeding 40 mph) highways except as indicated in clauses (ii) - (iv) of this subparagraph;

(ii) - (iv) (No change.)

(C) - (G) (No change.)

(5) - (13) (No change.)

(b) - (e) (No change.)

(f) Electric and communication lines.

(1) (No change.)

(2) Underground communication lines.

(A) - (C) (No change.)

(D) Multiple conduits.

(i) Shared conduits. When an existing utility rents, leases, or sells conduit usage to another utility, the new utility and the conduit owner must jointly submit a use and occupancy agreement [~~joint Utility Installation Request~~] before placement of a new line within the conduit.

(ii) (No change.)

(E) - (F) (No change.)

§21.52. Forms--General.

(a) Use and occupancy agreement forms [~~and notice forms~~] are required [~~provided~~] for use for utility facilities installed, adjusted, relocated, or retained within highway right of way [~~right-of-way~~]. These forms provide for a definite understanding as to the location and manner in which utilities will be installed and/or maintained and, where applicable, provide the necessary rights needed by the state to occupy the property interests held by the utility company.

(b) (No change.)

(c) Other forms are also provided for conveyance of utility company property interests to the state when such interests within highway rights of way [~~rights-of-way~~] are abandoned.

§21.53. Joint Use [~~and Occupancy~~] Agreement Forms.

(a) Joint use [~~Use and occupancy~~] agreement forms are to be used when a utility has a prior property interest which is being retained within the highway right of way, and:

(1) when in connection with active highway projects an adjusted or relocated utility facility occupies that part of the highway right of way; or

(2) when a utility facility is retained within that part of the highway right of way without adjustment unless the utility has a previously approved department joint use agreement [~~use and occupancy agreement or approved notice form~~] covering the right of way limits and which includes provisions for control of access when applicable. [~~Such forms are used also when a utility has a prior property interest which is being retained within the highway right of way.~~]

(b) These forms shall include such terms, [~~and~~] conditions, and utility location plans as may be prescribed by the director of the Right of Way Division to convey necessary information in order to protect and preserve the state highway system and the safety, health, and welfare of its use by the traveling public. Utility location plans shall be in accordance with the requirements contained in this subchapter concerning utility accommodation.

§21.54. Use and Occupancy Agreement [~~Notice~~] Forms.

(a) Use and occupancy agreement forms, other than joint use agreements, are to be used: [~~Notice forms are provided for use~~]

(1) for new utility installation [~~installations~~] after highway construction is completed;[~~. They are also provided~~]

(2) for new utility installation placed before or during highway construction except[~~:~~]

[~~(1)~~] where the utility has a compensable property interest; [~~or~~]

[~~(2) the state is participating in the adjustment or relocation cost of the utility installation.~~]

(3) when in connection with active highway projects an adjusted or relocated utility facility occupies part of the highway right of way; or

(4) when a utility facility is retained within the highway right of way without adjustment unless the utility has a previously approved department use and occupancy agreement covering the right of way limits and which includes provisions for control of access when applicable.

(b) These forms shall include such terms, conditions, and utility location plans, as may be prescribed by the director of the Maintenance Division to convey necessary information in order [~~and~~] to protect and preserve the state highway system and the safety, health, and welfare[~~,~~] of its use by the traveling public. Utility location plans shall be in accordance with the requirements contained in this subchapter [~~undesignated head~~] concerning utility accommodation.

(c) In addition to the requirements in subsection (b) of this section, the district engineer may prescribe special district requirements which will be justified based on the specific soil, terrain, weather, vegetation, trees, traffic characteristics, type of utility line, or other factors unique to the area.

(d) The district engineer is authorized to approve all use and occupancy agreement [~~notice~~] forms, other than joint use agreements, except those on utility bridges, attachments to highway structures, or those which include exceptions as cited in §21.35 of this subchapter.

§21.55. Abandoned Interests.

When a utility installation is relocated off its property interests or outside the highway rights of way [~~rights-of-way~~], the abandoned interest or rights of the utility company within the new highway right of way [~~right-of-way~~] should be conveyed to the state.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on August 29, 2008.

TRD-200804685

Bob Jackson
General Counsel
Texas Department of Transportation
Earliest possible date of adoption: October 12, 2008
For further information, please call: (512) 463-8683

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SUBCHAPTER O. UTILITY ACCOMMODATION FOR RAIL FACILITIES

43 TAC §21.902, §21.905

STATUTORY AUTHORITY

The amendments are proposed under Transportation Code, §201.101, which provides the Texas Transportation Commission with the authority to establish rules for the conduct of the work of the department, and more specifically, Transportation Code, §203.095, which directs the department to adopt rules to implement Transportation Code, Chapter 203, Subchapter E concerning relocation of utility facilities required by improvements of the state highway system, and Transportation Code, §91.003, which directs the department to adopt rules to implement Transportation Code, Chapter 91 concerning the development, operation, and maintenance of a rail facility.

CROSS REFERENCE TO STATUTE

Transportation Code, Chapter 91, Subchapter F, and Transportation Code, Chapter 203, Subchapter E.

§21.902. Definitions.

The following words and terms, when used in this subchapter, shall have the following meanings, unless the context clearly indicates otherwise.

(1) - (20) (No change.)

(21) Joint use agreement--A use and occupancy agreement that describes the obligations, responsibilities, rights, and privileges vested in the department and retained by the utility, and used for situations in which the utility has a compensable interest in the land occupied by its facilities and the land is to be jointly occupied and used for railroad and utility purposes.

(22) [~~(21)~~] Manhole--An opening to an underground utility system that workers or others may enter for the purpose of maintaining, inspecting, or making installations.

(23) [~~(22)~~] Pipe--A tubular product made as a production item for sale, except for cylinders formed from plate in the course of fabrication of auxiliary equipment.

(24) [~~(23)~~] Pressure--Relative internal pressure in PSI (pounds per square inch) gauge.

(25) [~~(24)~~] Right of way--A general term denoting land or a property interest in the land, usually in a strip, used for railroad transportation purposes.

(26) [~~(25)~~] Seal--A material placed between the carrier pipe and casing to prevent the intrusion of water, where ends of casing are below the ground surface.

(27) [~~(26)~~] Shoulder--That portion of the roadbed outside the ballast.

(28) [~~(27)~~] Trenching--Installing in a narrow excavation.

(29) [~~(28)~~] Tunneling--Excavating the earth ahead of a large diameter pipe by one or more of the following processes.

(A) The earth ahead of the pipe is excavated using hand tools while the pipe is pushed through the holes by means of jacks, rams, or other mechanical devices.

(B) The excavation is carried on simultaneously with the installation of tunnel liner plates.

(C) The tunnel liner plates are installed immediately behind the excavation as it progresses and are assembled completely away from the inside.

(30) Use and occupancy agreement--The written document, whether in the form of an agreement, acknowledgment, notice, or request, by which the department approves the use and occupancy of railroad right of way by utility facilities.

(31) [~~(29)~~] Utility--All publicly or cooperatively owned lines, facilities, and systems for producing, transmitting, or distributing communications, power, electricity, light, heat, gas, oil, crude products, water, steam, waste, storm water, and other similar commodities that serve the public.

§21.905. Requests.

Use and occupancy [~~Joint-use~~] agreements are required when utility facilities are installed, relocated, or maintained along or across department property. In situations in which the utility has a prior property interest that is being retained within the railroad right of way, a joint use agreement is required. Approval of requests to install, maintain, or relocate a utility facility within department property shall be evidenced by an agreement that includes the terms, conditions, and utility location plans as may be prescribed by the director of the Right of Way Division to convey necessary information in order to protect and preserve the railroad and the safety, health, and welfare of those who are using it. Requests for utility facility installation along with plans for the proposed installation shall be submitted to the department at least 30 days prior to the commencing of construction. It is the utility's responsibility to inform the department, in writing, of any:

(1) material change in the character, use, or function of an approved utility facility; and

(2) name, ownership, or address change.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on August 29, 2008.

TRD-200804686
Bob Jackson
General Counsel
Texas Department of Transportation
Earliest possible date of adoption: October 12, 2008
For further information, please call: (512) 463-8683

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WITHDRAWN RULES

Withdrawn Rules include proposed rules and emergency rules. A state agency may specify that a rule is withdrawn immediately or on a later date after filing the notice with the Texas Register. A proposed rule is withdrawn six months after the date of publication of the proposed rule in the Texas Register if a state agency has failed by that time to adopt, adopt as amended, or withdraw the proposed rule. Adopted rules may not be withdrawn. (Government Code, §2001.027)

TITLE 4. AGRICULTURE

PART 1. TEXAS DEPARTMENT OF AGRICULTURE

CHAPTER 19. QUARANTINES AND NOXIOUS AND INVASIVE PLANTS

SUBCHAPTER V. MEXICAN FRUIT FLY QUARANTINE

4 TAC §§19.500 - 19.508

The Texas Department of Agriculture withdraws the emergency new §§19.500 - 19.508 which appeared in the April 18, 2008, issue of the *Texas Register* (33 TexReg 3090).

Filed with the Office of the Secretary of State on August 27, 2008.

TRD-200804677
Dolores Alvarado Hibbs
General Counsel
Texas Department of Agriculture
Effective date: September 5, 2008
For further information, please call: (512) 463-4075

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ADOPTED RULES

Adopted rules include new rules, amendments to existing rules, and repeals of existing rules. A rule adopted by a state agency takes effect 20 days after the date on which it is filed with the Secretary of State unless a later date is required by statute or specified in the rule (Government Code, §2001.036). If a rule is adopted without change to the text of the proposed rule, then the *Texas Register* does not republish the rule text here. If a rule is adopted with change to the text of the proposed rule, then the final rule text is included here. The final rule text will appear in the Texas Administrative Code on the effective date.

TITLE 1. ADMINISTRATION

PART 10. DEPARTMENT OF INFORMATION RESOURCES

CHAPTER 201. PLANNING AND MANAGEMENT OF INFORMATION RESOURCES TECHNOLOGIES

1 TAC §201.9

The Texas Department of Information Resources (department) adopts amended 1 TAC §201.9, concerning board policies. The amended rule includes subsection (c) which describes the department's donation policy, including the criteria, procedures and standards of conduct governing the relationship between the department and its officers and employees and private donors. The rule is adopted without change to the proposed text as published in the June 6, 2008, issue of the *Texas Register* (33 TexReg 4406).

New subsection (c) authorizes the department to accept gifts and donations the department determines are in the public interest to accept as a result of an emergency, including both natural and manmade disasters. The executive director is authorized by the board to accept donations up to $250,000 in value so long as each such donation is acknowledged by the board within thirty days of the donation. Gifts and donations that exceed $250,000 in value must be approved by the board. Subsection (c)(4) requires all gifts be recorded in the board minutes along with the name of the donor, a description of the donation and a statement of the purpose of the donation. Donations must be found to further the department's mission or duties, provide significant public benefit and not influence or reasonably appear to influence the performance of duties by the department. Subsection (c)(6) requires execution of a donation agreement if the value of the donation exceeds $10,000, or if the department determines a donation agreement is necessary. Subsection (c)(7) delineates the information that is to be disclosed in the donation agreement.

No comments were received in response to publication of the proposed amendment of the rule.

The rule is adopted under Chapter 2255, Texas Government Code, which requires the adoption of rules governing the relationship between donors and the donee agency and its employees and §2054.052(a), Texas Government Code, which authorizes the department to adopt rules necessary to implement its responsibilities under the Information Resources Management Act.

Section 2054.052(g), Texas Government Code, is affected by this amendment.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on August 27, 2008.

TRD-200804663
K. Renee Mauzy
General Counsel
Department of Information Resources
Effective date: September 16, 2008
Proposal publication date: June 6, 2008
For further information, please call: (512) 475-4700

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CHAPTER 206. STATE WEB SITES

The Texas Department of Information Resources (department) adopts the amendments to 1 TAC Chapter 206, §§206.1, 206.50, 206.51, 206.54, 206.55, 206.70, 206.71, 206.74, and 206.75, concerning State Web Sites. Chapter 206, §§206.1, 206.50, 206.51, 206.55, 206.70, 206.71, and 206.75 are adopted with changes to the proposed text as published in the June 6, 2008, issue of the *Texas Register* (33 TexReg 4407). Chapter 206, §206.54 and §206.74 are adopted without change.

The amendments implement the requirements of Chapter 2054, Texas Government Code, Subchapter M, Access to Electronic and Information Resources By Individuals With Disabilities.

The department received written comments during the 30-day comment period from a Research Specialist, representing the Texas Governor's Committee On People with Disabilities (committee), the Texas Department of Aging and Disability Services, Center for Consumer and External Affairs, Stakeholder Relations Unit, DADS Council and EIR Accessibility Coordinator (DADS), Texas HHSC Civil Rights Office, Accessibility and Compliance Coordinator (HHSC), and an interested individual. A summary of the comments and responses follows.

Comment: The committee recommended a change to the current definition of "Home page" in 1 TAC §206.1(13) to the definition provided by the International Standards Organization (ISO 9241-151). "Home page: main page through which users typically enter a website and whose URL is typically published or linked as the main Web address of an organization or an individual."

Response: The department has had considerable discussion with interested parties regarding the definition of "Home page." The definition proposed by the committee does not include a clear reference to an "entry point to a state Web site", in addition to the initial page of a state Web site. The department notes that "Key public entry point" is defined at 1 TAC §206.1(18), and the

department believes that "entry point to a state Web site" must be addressed in the definition of "Home page." The department believes the current definition reflects the consensus of the department and the interested parties, therefore no change was made.

Comment: The committee recommended that "Intranet" be added to the list of terms defined in 1 TAC §206.1. The committee recommended adherence to the definition provided by the International Organization of Standards (ISO), which is as follows: "a computer network using Internet standards, the access to which is limited to members of a particular organization such as a company."

Response: The department agrees with the committee and added "Intranet" to the list of terms defined in 1 TAC §206.1 using the recommended definition.

Comment: The committee recommended that "Assistive Technology", used in 1 TAC §206.50(a)(12), be added to the list of terms defined in 1 TAC §206.1.

Response: In response to the committee's recommendation, the department added "Assistive Technology" to the list of terms defined in 1 TAC §206.1 using the definition found in 1 TAC §213.1(3).

Comment: The committee commented that the definition of "Survey" did not include the requirement for an annual survey, in compliance with House Bill 2819.

Response: The department disagrees. The requirement that the survey be conducted annually was removed from Texas Government Code §2054.464, by action of House Bill 1788, 80th Regular Session.

Comment: The committee requested a change to "Training/Technical Assistance" as defined in 1 TAC §206.1(28), to add the adjective "Accessibility".

Response: The department disagrees. The department notes that the current definition of "Training/Technical Assistance" includes the adjective "Accessibility". Therefore, the department did not make the requested change.

Comment: The committee and an interested individual requested a change to the definition of "Usability" as defined in 1 TAC §206.1(32), and the interested individual noted certain grammatical errors in the existing definition.

Response: In response to the comments, the department has deleted the existing definition of "Usability" in 1 TAC §206.1(32), and replaced it with the following new definition: "Usability--The extent to which an application or product is determined to be well-designed with the goals of maximizing user task completion, comprehension, and efficiency."

Comment: The committee requested a change to the definition of "Web Page" in 1 TAC §206.1(36) by adding "PDF" at the end of the list of examples, and also recommended that the department use the following ISO definition of a "Web Page": "a coherent presentation of a content object or set of content objects and associated interaction objects through a user agent."

Response: In response to the comment, the department agrees that adding "PDF" to the list of examples is appropriate and added it to the definition. The department rejects the suggestion to use the ISO definition of a "Web Page" because a change to the definition might have an effect on other rules, and may create unintended consequences. The department will review this recommendation for future consideration.

Comment: The committee requested the term "Web applications," as used in 1 TAC §206.51(b), be added to the list of terms defined in 1 TAC §206.1.

Response: In response to the comment, the department felt that "Web applications" is a commonly understood term and therefore did not make the change.

Comment: The committee commented that in 1 TAC §206.50(a), the phrase "Web pages/content" is used, though only "Web pages" is defined.

Response: In response to the comment, the department agrees that Web page is a defined term and using a combination of terms, such as "Web page/content", creates an ambiguity. The department therefore deleted the instances of "Web page/content" in 1 TAC §§206.1, 206.50(a) and 206.70(a), and replaced them with "Web pages and Web content."

Comment: The committee commented that 1 TAC §206.50(a)(2) does not include a §508 requirement addressing the synchronization of alternate formats with multimedia presentations.

Response: The committee's comment was related to a requirement that was discussed during the drafting of the 2006 version of the 1 TAC Chapter 206 rules. At that time, the accessibility workgroup discussed a requirement for agencies to comply with §508, 36 C.F.R. Part 1194.22 (b) that states "Equivalent alternatives for any multimedia presentation shall be synchronized with the presentation." The accessibility workgroup determined that a synchronization requirement would cause undue burden and excessive cost to state agencies and institutions of higher education. The department also notes that accessibility of multimedia products is addressed in 1 TAC §213.12(b), concerning Video and Multimedia Products, which provides that "Upon receiving a request for accommodation of a Web cast of training/informational video productions which support the agency's mission, each state agency which receives such a request for accommodation shall provide an alternative form(s) of accommodation in accordance with §2054.456 and §2054.457, Texas Government Code." The department has determined that no changes to the proposed rule relating to this comment are necessary.

Comment: The committee asked the department to clarify the meaning of "types of Internet connections" in §206.50(e) by suggesting that the department consider replacing "types" with a term like "upload/download speed."

Response: The department believes that "types of Internet connections" is a commonly understood term and common usage generally addresses the speed of a connection. Therefore the department did not make the requested change.

Comment: HHSC commented that 1 TAC §206.51(b) and §213.21(b) require agencies to develop a plan"... by which all noncompliant Web pages, Web sites and Web applications will be brought into compliance ...", and asked if that includes electronic and information resources (EIR) in existence before September 2006. Read literally, it includes all EIR, not just that produced since September 2006.

Response: The department agrees with the comment that 1 TAC §206.51(b) is ambiguous. If read literally, the proposed rule might lead a reader to conclude incorrectly that all EIR must be brought into compliance, including those Web pages, Web sites and Web applications that are not subject to the Web ac-

cessibility standards. Therefore, 1 TAC §206.51(b) has been revised to require that the plan only address Web pages, Web sites and Web applications that are subject to the Web accessibility standards, as defined in 1 TAC §206.1(36). Because 1 TAC §206.71(b) uses the same terminology applied to Institutions of Higher Education, the same change was also made to 1 TAC §206.71(b).

Comment: The committee requested a revision to 1 TAC §206.51(c) to clarify that the survey is used as a means of identifying non-compliant pages.

Response: In response to the comment, the department agrees and revised 1 TAC §206.51(c). The new wording is as follows: "(c) The department shall develop and publish a standard operating procedure to manage agency non-compliance, including a process for a corrective action plan for non-compliant items identified on an accessibility survey." Because 1 TAC §206.71(c) uses the same terminology applied to Institutions of Higher Education, the same change was also made to 1 TAC §206.71(c).

Comment: DADS commented that the specific job duties of the Accessibility Coordinator should be left to the discretion of each agency.

Response: In response to the comment, the department affirms that the specific job duties of the Accessibility Coordinator are not defined by rule. It is the responsibility of each agency to identify the specific job duties of their Accessibility Coordinator. No changes were made to the rule. The department intends to provide additional guidance and assistance on this topic following adoption of the rule.

Comment: The committee asked the department to clarify the meaning of "site validation" in 1 TAC §206.55(b).

Response: In response to the comment, the department noted that site validation is discussed and defined in 1 TAC §206.50(c), (d) and (f) sufficiently to address the committee's concerns. Therefore, no change to the rules is necessary.

In reviewing the proposed rules, the department discovered a grammatical error, and corrected the grammatical error in 1 TAC §206.50(f) and §206.70(f).

SUBCHAPTER A. DEFINITIONS

1 TAC §206.1

The amendments are adopted under §2054.052(a), Texas Government Code, which authorizes the department to adopt rules necessary to implement its responsibilities under the Information Resources Management Act, and §2054.453, Texas Government Code, which authorizes the department to adopt rules necessary to implement its responsibilities for the development, procurement, maintenance, and use of electronic and information resources by state agencies to provide access to individuals with disabilities.

§206.1. Applicable Terms and Technologies for State Web Sites.

The following words and terms, when used with this chapter, shall have the following meanings, unless the context clearly indicates otherwise.

(1) 508 compliance--Using testing/validation tools and procedures to check Web pages and Web content for compliance with the §508 requirements of the Rehabilitation Act relating to Web accessibility contained in 36 C.F.R. Part 1194.

(2) Accessible--A Web page that can be used in a variety of ways and that does not depend on a single sense or ability.

(3) Accessibility Coordinator--Coordinators are responsible for organizing and supporting the implementation of Texas Government Code, Chapter 2054, Subchapter M within their respective agencies, and have been appointed by their agency as the central point of contact for information concerning accessibility issues and solutions for electronic and information resources.

(4) Accessibility Policy--The policies of a state agency or institution of higher education to ensure that access to its information, services, and programs are accessible, usable, understandable and navigable.

(5) Alternate formats--Alternate formats usable by people with disabilities may include, but are not limited to, Braille, ASCII text, large print, recorded audio, and electronic formats that comply with this chapter.

(6) Alternate methods--Different means of providing information, including product documentation, to people with disabilities. Alternate methods may include, but are not limited to, voice, fax, relay service, TTY, Internet posting, captioning, text-to-speech synthesis, and audio description.

(7) Assistive technology--Any item, piece of equipment, or system, whether acquired commercially, modified, or customized, that is commonly used to increase, maintain, or improve functional capabilities of individuals with disabilities.

(8) Contact information--A list of key personnel and/or position or program contacts, including public contact telephone numbers, general e-mail address, and other information deemed necessary by the agency or institution of higher education for facilitating public access.

(9) Compact With Texans--Customer service standards and performance measures required of state agencies, including institutions of higher education, by §2113.006 and §2114.006, Texas Government Code.

(10) Electronic and information resources--Includes information technology and any equipment or interconnected system or subsystem of equipment, that is used in the creation, conversion, duplication, or delivery of data or information. The term electronic and information resources includes, but is not limited to, telecommunications products (such as telephones), information kiosks and transaction machines, World Wide Web sites, multimedia, and office equipment such as copiers and fax machines. The term does not include any equipment that contains embedded information technology that is used as an integral part of the product, but the principal function of which is not the acquisition, storage, manipulation, management, movement, control, display, switching, interchange, transmission, or reception of data or information. For example, HVAC (heating, ventilation, and air conditioning) equipment such as thermostats or temperature control devices and medical equipment where information technology is integral to its operation are not information technology.

(11) Electronic and information resources accessibility standards--Texas accessibility standards for Electronic and Information Resources that comply with the applicable specifications contained in Chapter 213, Subchapter B, §§213.10 - 213.16 of this title for state agencies and Chapter 213, Subchapter C, §§213.30 - 213.36 of this title for institutions of higher education.

(12) Exception--A justified, documented non-conformance with one or more standards or specifications of Chapter 206 and/or Chapter 213 of this title, which has been approved by the Executive Director of an Agency or the President or Chancellor of an Institution of Higher Education.

(13) Exemption--A justified, documented non-conformance with one or more standards or specifications of Chapter 206 and/or Chapter 213 of this title, which has been approved by the department and which is applicable statewide.

(14) Home page--The initial page or entry point to a state Web site.

(15) HTML--HyperText Markup Language.

(16) Internet--The network of interconnected networks employing standards published by the Internet Engineering Task Force (IETF).

(17) Intranet--A computer network using Internet standards, the access to which is limited to members of a particular organization such as a company.

(18) Key public entry point--A Web page that a state agency or institution of higher education has specifically designed for members of the general public to access official information (e.g., the governing or authoritative documents) from the agency or institution of higher education.

(19) Link Policy--State Web Site Link and Privacy Policy that identify the terms under which a person may use, copy information from, or link to a generally accessible Internet site of a state agency or institution of higher education. The requirements for these policies for state agencies other than institutions of higher education are set forth in Subchapter B, §206.54 of this chapter. The requirements for these policies for institutions of higher education are set forth in Subchapter C, §206.74 of this chapter.

(20) Logging software and cookies--Particular methods employed for the purpose of tracking visitors to Web sites. The information collected for analysis can include where the request came from, time, pages visited, and identifiable information about the visitor.

(21) Open Records/Public Information Act notice--The policies and practices of the state agency or institution of higher education for providing public access to governmental information and decisions.

(22) Privacy and Security Policy--A statement about what information is collected by the Web site of a state agency or institution of higher education and how the information will be used and protected, under what conditions the information may be shared or released to another party, and the procedure under which a member of the public is entitled to receive and/or correct information that a state agency, including an institution of higher education, maintains about the individual.

(23) Site Owners--A state agency or institution of higher education that maintains Web pages.

(24) Site Policies page--A Web page containing the policies of the state agency or institution of higher education, or a link to each policy.

(25) State Web site--A state agency or institution of higher education owned, operated by/or for, or funded Web site connected to the Internet, including the home page and any key public entry points.

(26) SSN--Social Security Number.

(27) SSL--Secure Sockets Layer. The Internet security standard for point-to-point, encrypted connections between Web servers and client browsers.

(28) Statewide Search--A link to the TRAIL Web site.

(29) Survey--An assessment of State Web site compliance with the accessibility standards.

(30) Training/Technical Assistance--Accessibility training and technical assistance for Web content providers/developers on compliance with the accessibility standards.

(31) TRAIL--Texas Records and Information Locator or its successor.

(32) Transaction payment information--Bank account and routing number, credit, debit, charge, or other forms of card-based, access device number, and/or Internet based payment systems. Access device means a card, plate, code, account number, personal identification number, electronic serial number, mobile identification number, or other telecommunications service, equipment, or instrument identifier or means of account access that alone, or in conjunction with another access device, may be used to:

(A) obtain money, goods, services, or another thing of value; or

(B) initiate a transfer of funds other than a transfer originated solely by paper instrument.

(33) Transaction Risk Assessment--An evaluation of the security and privacy required for an interactive Web session providing public access to government information and services. Additional information and guidelines are included in PART 2: Risks Pertaining to Electronic Transactions and Signed Records in "The Guidelines for the Management of Electronic Transactions and Signed Records" available on the department's Web site.

(34) Usability--The extent to which an application or product is determined to be well-designed with the goals of maximizing user task completion, comprehension, and efficiency.

(35) W3C--World Wide Web Consortium. Additional information and copies of the current standards and recommendations are available at http://www.w3.org.

(36) Web accessibility standards--Texas Web accessibility standards for Web pages and Web content that comply with the applicable specifications contained in Subchapter B, §206.50 of this chapter for state agencies and Subchapter C, §206.70 of this chapter for institutions of higher education.

(37) Web bug--Code used to track and/or report information about a visitor to a Web page, or used in an e-mail message. Also known as a Web Beacon or Clear GIF.

(38) Web page--A document, on a state Web site, consisting of a file (e.g. HTML, PDF, dynamic links, and PHP) and any related files for scripts and graphics, and often hyperlinked to other documents.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on August 27, 2008.

TRD-200804664
K. Renee Mauzy
General Counsel
Department of Information Resources
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Proposal publication date: June 6, 2008
For further information, please call: (512) 475-4700

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SUBCHAPTER B. STATE AGENCY WEB SITES

1 TAC §§206.50, 206.51, 206.54, 206.55

The amendments are adopted under §2054.052(a), Texas Government Code, which authorizes the department to adopt rules necessary to implement its responsibilities under the Information Resources Management Act, and §2054.453, Texas Government Code, which authorizes the department to adopt rules necessary to implement its responsibilities for the development, procurement, maintenance, and use of electronic and information resources by state agencies to provide access to individuals with disabilities.

§206.50. Accessibility and Usability of State Web Sites.

(a) Effective September 1, 2006, unless an exception is approved by the executive director of the state agency or an exemption has been made for specific technologies pursuant to §213.17 of this title, all new or changed Web pages and Web content shall comply with the standards described in this subchapter. Each state agency shall include in its accessibility policy the following standards/specifications:

(1) A text equivalent for every non-text element shall be provided (e.g., via "alt," "longdesc," or in element content).

(2) Based on a request for accommodation of a Web cast of a live/real time open meeting (Open Meetings Act, Texas Government Code, Chapter 551) or training and informational video productions which support the agency's mission, each state agency shall consider alternative forms of accommodation. Refer to §206.1 of this chapter for definitions for Alternate Formats and Alternate Methods.

(3) Web pages shall be designed so that all information conveyed with color is also available without color.

(4) Documents shall be organized so they are readable without requiring an associated style sheet.

(5) Redundant text links shall be provided for each active region of a server-side image map.

(6) Client-side image maps shall be provided instead of server-side image maps except where the regions cannot be defined with an available geometric shape.

(7) Row and column headers shall be identified for data tables.

(8) Markup shall be used to associate data cells and header cells for data tables that have two or more logical levels of row or column headers.

(9) Frames shall be titled with text that facilitates frame identification and navigation.

(10) Pages shall be designed to avoid causing the screen to flicker with a frequency greater than 2 Hz and lower than 55 Hz.

(11) An alternative version page, with equivalent information or functionality, shall be provided to make a Web site comply with the provisions of this section, when compliance cannot be accomplished in any other way. The content of the alternative page shall be updated whenever the primary page changes.

(12) When pages utilize scripting languages to display content, or to create interface elements, the information provided by the script shall be identified with functional text that can be read by assistive technology.

(13) When a Web page requires that an applet, plug-in or other application be present on the client system to interpret page content, the page must provide a link to a plug-in or applet that complies with the following:

(A) When software is designed to run on a system that has a keyboard, product functions shall be executable from a keyboard where the function itself or the result of performing a function can be discerned textually.

(B) Applications shall not disrupt or disable activated features of other products that are identified as accessibility features, where those features are developed and documented according to industry standards. Applications also shall not disrupt or disable activated features of any operating system that are identified as accessibility features where the application programming interface for those accessibility features has been documented by the manufacturer of the operating system and is available to the product developer.

(C) A well-defined on-screen indication of the current focus shall be provided that moves among interactive interface elements as the input focus changes. The focus shall be programmatically exposed so that assistive technology can track focus and focus changes.

(D) Sufficient information about a user interface element including the identity, operation and state of the element shall be available to assistive technology. When an image represents a program element, the information conveyed by the image must also be available in text.

(E) When bitmap images are used to identify controls, status indicators, or other programmatic elements, the meaning assigned to those images shall be consistent throughout an application's performance.

(F) Textual information shall be provided through operating system functions for displaying text. The minimum information that shall be made available is text content, text input caret location, and text attributes.

(G) Applications shall not override user selected contrast and color selections and other individual display attributes.

(H) When animation is displayed, the information shall be displayable in at least one non-animated presentation mode at the option of the user.

(I) Color coding shall not be used as the only means of conveying information, indicating an action, prompting a response, or distinguishing a visual element.

(J) When a product permits a user to adjust color and contrast settings, a variety of color selections capable of producing a range of contrast levels shall be provided.

(K) Software shall not use flashing or blinking text, objects, or other elements having a flash or blink frequency greater than 2 Hz and lower than 55 Hz.

(L) When electronic forms are used, the form shall allow people using assistive technology to access the information, field elements, and functionality required for completion and submission of the form, including all directions and cues.

(14) When electronic forms are designed to be completed on-line, the form shall allow people using assistive technology to access the information, field elements, and functionality required for completion and submission of the form, including all directions and cues.

(15) A method shall be provided that permits users to skip repetitive navigation links.

(16) When a timed response is required, the user shall be alerted and given sufficient time to indicate more time is required.

(b) Effective September 1, 2006, unless an exception is approved by the executive director of the state agency or an exemption has been made for specific technologies pursuant to §213.17 of this title, all new or changed Web page/site designs shall be tested by the state agency using one or more §508 compliance tools in conjunction with manual procedures to validate compliance with this chapter. State agencies shall establish policies to monitor their Web site for compliance with this chapter. Additional information about testing tools and resources are available on the department's Web site.

(c) Each state Web site shall avoid vendor specific "non-standard" extensions and shall comply with applicable standards (e.g., IEFT (if using secure socket layer (SSL) connections), W3C (if using Cascading Style Sheets (CSS) and validated using the W3C CSS Validation Service), etc. For guidance regarding "non-standard" extensions, emerging technologies and applicable standards, state agencies shall refer to the department's guidelines

(d) The policy should cover testing and validation of Web pages.

(e) Each state Web site should be designed with consideration for the types of Internet connections available to the citizens of Texas, and undergo accessibility and usability testing.

(f) The policy should cover the testing/validation tools and manual procedures used for validating compliance with Chapter 2054, Subchapter M, Texas Government Code.

§206.51. Accessibility Policy and Coordinator.

(a) Each state agency shall develop and publish an accessibility policy, by June 30, 2009, which includes the standards and specifications of this chapter.

(b) Each state agency's accessibility policy shall include a plan by which all Web pages, Web sites and Web applications that are subject to the Web accessibility standards will be brought into compliance with the specifications and standards of this chapter.

(c) The department shall develop and publish a standard operating procedure to manage agency non-compliance, including a process for a corrective action plan to remediate non-compliant items identified through an accessibility survey.

(d) Each state agency shall appoint an Accessibility Coordinator to develop, support and maintain their internal accessibility policy.

§206.55. Linking and Indexing State Web Sites.

(a) All new or changed HTML documents on a state agency Web site that meet the criteria of a "state publication" as defined by the Texas State Library and Archives Commission shall include the meta tags required by the Texas State Library and Archives Commission (13 TAC §3.9).

(b) The home page of a State Web Site, and key public entry points, shall include an "Accessibility" link to, or a "Site Policies" link to a Web page that contains the state agency's accessibility policy, site validation (e.g., Chapter 2054, Subchapter M, Texas Government Code), contact information for the agency's Accessibility Coordinator, and a link to the Governor's Committee on People with Disabilities Web site.

(c) The home page of a state Web site shall incorporate TRAIL metadata and shall:

(1) Provide links to the following State of Texas resources:

(A) Texas home page;

(B) Texas Homeland Security Web site;

(C) Link Policy, or the Site Policies page;

(D) TRAIL, Statewide Search Web site.

(2) Provide individual links to the following information, or to the Site Policies page with links to the following:

(A) Privacy and Security policy;

(B) State agency contact information;

(C) Description of the Open Records/Public Information Act policy/procedures of the state agency;

(D) Compact With Texans.

(d) All key public entry points shall provide a link to the following:

(1) Agency home page;

(2) Provide individual links to the following, or a link to the Site Policies page with links to the following:

(A) State agency contact information;

(B) Privacy and Security policy.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on August 27, 2008.

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K. Renee Mauzy
General Counsel
Department of Information Resources
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For further information, please call: (512) 475-4700

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SUBCHAPTER C. INSTITUTION OF HIGHER EDUCATION WEB SITES

1 TAC §§206.70, 206.71, 206.74, 206.75

The amendments are adopted under §2054.052(a), Texas Government Code, which authorizes the department to adopt rules necessary to implement its responsibilities under the Information Resources Management Act, and §2054.453, Texas Government Code, which authorizes the department to adopt rules necessary to implement its responsibilities for the development, procurement, maintenance, and use of electronic and information resources by state agencies to provide access to individuals with disabilities.

§206.70. Accessibility and Usability of Institution of Higher Education Web Sites.

(a) Effective September 1, 2006, unless an exception is approved by the president or chancellor of an institution of higher education or an exemption has been made for specific technologies pursuant to §213.37 of this title, all new or changed Web pages and Web content shall comply with the standards described in this subchapter. Each institution of higher education shall include in its accessibility policy the following standards/specifications:

(1) A text equivalent for every non-text element shall be provided (e.g., via "alt," "longdesc," or in element content).

(2) Upon receiving a request for accommodation of a Web cast of an open meeting (as defined in the Open Meetings Act, Chapter 551, Texas Government Code) or of training/informational video productions which support the institution of higher education's mission, each institution of higher education which receives such a request for accommodation shall provide an alternative form(s) of accommodation in accordance with §2054.456 and §2054.457, Texas Government Code. Refer to §206.1 of this chapter for definitions for Alternate Format and Alternate Methods.

(3) Web pages shall be designed so that all information conveyed with color is also available without color.

(4) Documents shall be organized so they are readable without requiring an associated style sheet.

(5) Redundant text links shall be provided for each active region of a server-side image map.

(6) Client-side image maps shall be provided instead of server-side image maps except where the regions cannot be defined with an available geometric shape.

(7) Row and column headers shall be identified for data tables.

(8) Markup shall be used to associate data cells and header cells for data tables that have two or more logical levels of row or column headers.

(9) Frames shall be titled with text that facilitates frame identification and navigation.

(10) Pages shall be designed to avoid causing the screen to flicker with a frequency greater than 2 Hz and lower than 55 Hz.

(11) An alternative version page, with equivalent information or functionality, shall be provided to make a Web site comply with the provisions of this section, when compliance cannot be accomplished in any other way. The content of the alternative page shall be updated whenever the primary page changes.

(12) When pages utilize scripting languages to display content, or to create interface elements, the information provided by the script shall be identified with functional text that can be read by assistive technology.

(13) When a Web page requires that an applet, plug-in or other application be present on the client system to interpret page content, the page must provide a link to a plug-in or applet that complies with the following:

(A) When software is designed to run on a system that has a keyboard, product functions shall be executable from a keyboard where the function itself or the result of performing a function can be discerned textually.

(B) Applications shall not disrupt or disable activated features of other products that are identified as accessibility features, where those features are developed and documented according to industry standards. Applications also shall not disrupt or disable activated features of any operating system that are identified as accessibility features where the application programming interface for those accessibility features has been documented by the manufacturer of the operating system and is available to the product developer.

(C) A well-defined on-screen indication of the current focus shall be provided that moves among interactive interface elements as the input focus changes. The focus shall be programmatically exposed so that assistive technology can track focus and focus changes.

(D) Sufficient information about a user interface element including the identity, operation and state of the element shall be available to assistive technology. When an image represents a program element, the information conveyed by the image must also be available in text.

(E) When bitmap images are used to identify controls, status indicators, or other programmatic elements, the meaning assigned to those images shall be consistent throughout an application's performance.

(F) Textual information shall be provided through operating system functions for displaying text. The minimum information that shall be made available is text content, text input caret location, and text attributes.

(G) Applications shall not override user selected contrast and color selections and other individual display attributes.

(H) When animation is displayed, the information shall be displayable in at least one non-animated presentation mode at the option of the user.

(I) Color coding shall not be used as the only means of conveying information, indicating an action, prompting a response, or distinguishing a visual element.

(J) When a product permits a user to adjust color and contrast settings, a variety of color selections capable of producing a range of contrast levels shall be provided.

(K) Software shall not use flashing or blinking text, objects, or other elements having a flash or blink frequency greater than 2 Hz and lower than 55 Hz.

(L) When electronic forms are used, the form shall allow people using assistive technology to access the information, field elements, and functionality required for completion and submission of the form, including all directions and cues.

(14) When electronic forms are designed to be completed on-line, the form shall allow people using assistive technology to access the information, field elements, and functionality required for completion and submission of the form, including all directions and cues.

(15) A method shall be provided that permits users to skip repetitive navigation links.

(16) When a timed response is required, the user shall be alerted and given sufficient time to indicate more time is required.

(b) Effective September 1, 2006, unless an exception is approved by the president or chancellor of an institution of higher education or an exemption has been made for specific technologies pursuant to §213.37 of this title, all new Web page/site designs shall be tested by the institution of higher education using one or more §508 compliance tools in conjunction with manual procedures to validate compliance with this chapter. Institutions of higher education shall establish policies to monitor their Web site for compliance with this chapter. Additional information about testing tools and resources are available from the department's Web site.

(c) Each state Web site shall avoid vendor specific "non-standard" extensions and shall comply with applicable standards (e.g., IEFT (if using secure socket layer (SSL) connections), W3C (if using Cascading Style Sheets (CSS) and validated using the W3C CSS Validation Service), etc. For guidance regarding "non-standard" extensions, emerging technologies and applicable standards, state agencies shall refer to the department's guidelines.

(d) The policy should cover testing and validation of Web pages.

(e) Each state Web site should be designed with consideration for the types of Internet connections available to the citizens of Texas, and undergo accessibility and usability testing.

(f) The policy should cover the testing/validation tools and manual procedures used for validating compliance with Chapter 2054, Subchapter M, Texas Government Code.

§206.71. Accessibility Policy and Coordinator.

(a) Each institution of higher education shall develop and publish an accessibility policy, by June 30, 2009, which includes the standards and specifications of this chapter.

(b) Each institution of higher education's accessibility policy shall include a plan by which all Web pages, Web sites and Web applications that are subject to the Web accessibility standards will be brought into compliance with the specifications and standards of this chapter.

(c) The department shall develop and publish a standard operating procedure to manage institution of higher education's non-compliance, including a process for a corrective action plan to remediate non-compliant items identified through an accessibility survey.

(d) Each institution of higher education shall appoint an Accessibility Coordinator to develop, support and maintain their internal accessibility policy.

§206.75. Linking and Indexing State Web Sites.

(a) All new or changed HTML documents on an institution of higher education Web site that meet the criteria of a "state publication" as defined by the Texas State Library and Archives Commission shall include the meta tags required by the Texas State Library and Archives Commission (13 TAC §3.9).

(b) The home page of a State Web Site, and key public entry points, shall include an "Accessibility" link to, or a "Site Policies" link to a Web page that contains the institution of higher education's accessibility policy, site validation (e.g., Chapter 2054, Subchapter M, Texas Government Code), contact information for the institution of higher education's Accessibility Coordinator, and a link to the Governor's Committee on People with Disabilities Web site.

(c) The home page of each institution of higher education Web site shall incorporate TRAIL metadata and shall:

(1) Provide links to the following State of Texas resources:

(A) Texas home page;

(B) Texas Homeland Security Web site;

(C) Link Policy, or the Site Policies page;

(D) TRAIL, Statewide Search Web site.

(2) Provide individual links to the following institution of higher education information, or to the Site Policies page with links to the following:

(A) Privacy and Security policy;

(B) Institution of higher education contact information;

(C) Description of the Open Records/Public Information Act policy/procedures of the institution of higher education;

(D) Compact With Texans.

(d) All key public entry points shall provide links to the following:

(1) Institution of higher education home page;

(2) Provide individual links to the following institution of higher education information, or to the Site Policies page with links to the following:

(A) Institution of higher education contact information;

(B) Privacy and Security policy.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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K. Renee Mauzy
General Counsel
Department of Information Resources
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For further information, please call: (512) 475-4700

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CHAPTER 213. ELECTRONIC AND INFORMATION RESOURCES

The Texas Department of Information Resources (department) adopts the amendments to 1 TAC Chapter 213, §§213.1, 213.10 - 213.17, and 213.30 - 213.37; and new §§213.18 - 213.21 and §§213.38 - 213.41, concerning Electronic and Information Resources. Chapter 213, §§213.1, 213.21, and 213.41 are adopted with changes to the proposed text as published in the June 6, 2008, issue of the *Texas Register* (33 TexReg 4418). Chapter 213, §§213.10 - 213.17, 213.30 - 213.37; and new §§213.18 - 213.20 and §§213.38 - 213.40 are adopted without change.

The amendments and new sections implement the requirements of Chapter 2054, Texas Government Code, Subchapter M, Access to Electronic and Information Resources By Individuals With Disabilities.

The department received written comments during the 30-day comment period from a Research Specialist, representing the Texas Governor's Committee On People with Disabilities (committee), the Texas Department of Aging and Disability Services, Center for Consumer and External Affairs, Stakeholder Relations Unit, DADS Council & EIR Accessibility Coordinator (DADS) and the Texas HHSC Civil Rights Office, Accessibility & Compliance Coordinator (HHSC) and an interested individual. A summary of the comments and responses follows.

Comment: The committee requested that "Web page/content" be changed to "Web pages and Web content" throughout the rule.

Response: In response to the comment, the department agrees that Web page is a defined term and using a combination of terms, such as "Web page/content", creates an ambiguity. The department therefore deleted the occurrence of "Web page/content" in the definition for "Web Accessibility Standards" in 1 TAC §213.1(18), and replaced it with "Web pages and Web Content."

Comment: An interested individual commented that the terms "Web pages, Web sites and Web application" used in 1 TAC §213.21(b), should be changed to "electronic and information resources."

Response: The department agrees that "Web pages, Web sites and Web application" was used incorrectly in this rule. In response to the comment, the phrase "Web pages, Web sites and Web application" was deleted from 1 TAC §213.21(b), and replaced with "electronic and information resources." Because 1 TAC §213.41(b) uses the same terminology applied to institutions of higher education, the same change was also made to 1 TAC §213.41(b).

Comment: HHSC commented that 1 TAC §206.51(b) and 1 TAC §213.21(b) requires agencies to develop a plan "... by which all noncompliant Web pages, Web sites and Web applications will be brought into compliance ...", and asked if that includes EIR (electronic and information resources) in existence before September 2006. Read literally, it includes all EIR, not just that produced since September 2006.

Response: The department agrees with the comment that 1 TAC §213.21(b) is ambiguous. If read literally, the proposed rule might lead a reader to conclude incorrectly that all EIR must be brought into compliance, including those electronic and information resources that are not subject to the electronic and information resources accessibility standards. Therefore, 1 TAC §213.21(b) has been revised to require that the plan only address EIR that are subject to the electronic and information resources accessibility standards, as defined in 1 TAC §213.1(7). Because 1 TAC §213.41(b) uses the same terminology applied to Institutions of Higher Education, the same change was also made to §213.41(b).

Comment: DADS commented that the specific job duties of the Accessibility Coordinator should be left to the discretion of each agency.

Response: In response to the comment, the department affirms that the specific job duties of the Accessibility Coordinator are not defined by rule. It is the responsibility of each agency to identify the specific job duties of their Accessibility Coordinator. No changes were made to the rule. The department intends to provide additional guidance and assistance on this topic following adoption of the rule.

SUBCHAPTER A. DEFINITIONS

1 TAC §213.1

The amendments are adopted under §2054.052(a), Texas Government Code, which authorizes the department to adopt rules necessary to implement its responsibilities under the Information Resources Management Act, and §2054.453, Texas Government Code, which authorizes the department to adopt rules necessary to implement its responsibilities for the development, procurement, maintenance, and use of electronic and information resources by state agencies to provide access to individuals with disabilities.

§213.1. Applicable Terms and Technologies for Electronic and Information Resources.

The following words and terms, when used with this chapter, shall have the following meanings, unless the context clearly indicates otherwise.

(1) Alternate formats--Alternate formats usable by people with disabilities may include, but are not limited to, Braille, ASCII text, large print, recorded audio, and electronic formats that comply with this chapter.

(2) Alternate methods--Different means of providing information, including product documentation, to people with disabilities. Alternate methods may include, but are not limited to, voice, fax, relay service, TTY, Internet posting, captioning, text-to-speech synthesis, and audio description.

(3) Assistive technology--Any item, piece of equipment, or system, whether acquired commercially, modified, or customized, that is commonly used to increase, maintain, or improve functional capabilities of individuals with disabilities.

(4) Buy Accessible Wizard--A Web-based application (http://www.buyaccessible.gov) that guides users through a process of gathering data and providing information about Electronic and Information Resources and §508 compliance, or other tools/resources developed by or for the Federal Government to indicate product/service compliance with the §508 standards (http://www.section508.gov).

(5) Commercially unavailable--An electronic or information resource for a specific function or business area that is not available in the commercial marketplace for purchase or development.

(6) Electronic and information resources--Includes information technology and any equipment or interconnected system or subsystem of equipment, that is used in the creation, conversion, duplication, or delivery of data or information. The term electronic and information resources includes, but is not limited to, telecommunications products (such as telephones), information kiosks and transaction machines, World Wide Web sites, multimedia, and office equipment such as copiers and fax machines. The term does not include any equipment that contains embedded information technology that is used as an integral part of the product, but the principal function of which is not the acquisition, storage, manipulation, management, movement, control, display, switching, interchange, transmission, or reception of data or information. For example, HVAC (heating, ventilation, and air conditioning) equipment such as thermostats or temperature control devices, and medical equipment where information technology is integral to its operation, are not information technology.

(7) Electronic and information resources accessibility standards--Texas accessibility standards for Electronic and Information Resources that comply with the applicable specifications contained in Subchapter B, §§213.10 - 213.16 of this chapter for state agencies and Subchapter C, §§213.30 - 213.36 of this chapter for institutions of higher education.

(8) Exception--A justified, documented non-conformance with one or more standards or specifications of Chapter 206 and/or Chapter 213 of this title, which has been approved by the Executive Director of an Agency or the President or Chancellor of an Institution of Higher Education.

(9) Exemption--A justified, documented non-conformance with one or more standards or specifications of Chapter 206 and/or Chapter 213 of this title, which has been approved by the department and which is applicable statewide.

(10) Information technology--Any equipment or interconnected system or subsystem of equipment, that is used in the automatic acquisition, storage, manipulation, management, movement, control, display, switching, interchange, transmission, or reception of data or information. The term includes computers (including desktop and laptop computers), ancillary equipment, desktop software, client-server software, mainframe software, Web application software and other types of software, firmware and similar procedures, services (including support services), and related resources.

(11) Operable controls--A component of a product that requires physical contact for normal operation. Operable controls include, but are not limited to, mechanically operated controls, input and output trays, card slots, keyboards, and keypads.

(12) Product--Electronic and information technology.

(13) Self Contained, Closed Products--Products that generally have embedded software and are commonly designed in such a fashion that a user cannot easily attach or install assistive technology. These products include, but are not limited to, information kiosks and information transaction machines, copiers, printers, calculators, fax machines, and other similar products.

(14) Telecommunications--The transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received.

(15) Training/Technical Assistance--Accessibility training and technical assistance for Web content providers/developers on compliance with the accessibility standards.

(16) TTY--An abbreviation for teletypewriter. Machinery or equipment that employs interactive text based communications through the transmission of coded signals across the telephone network. TTYs may include, for example, devices known as TDDs (telecommunication display devices or telecommunication devices for deaf persons) or computers with special modems. TTYs are also called text telephones.

(17) Voluntary Product Accessibility Template (VPAT)--A Web based summary to assist contracting officials and other buyers in making preliminary assessments regarding the availability of commercial Electronic and Information Resources products and services with features that support accessibility. The VPAT forms and additional information are available at http://www.section508.gov.

(18) Web Accessibility Standards--Texas Web accessibility standards for Web pages and Web content that comply with the applicable specifications contained in Chapter 206, Subchapter B, §206.50(a)(1) of this title for state agencies and Chapter 206, Subchapter C, §206.70(a)(1) of this title for institutions of higher education.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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K. Renee Mauzy
General Counsel
Department of Information Resources
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For further information, please call: (512) 475-4700

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SUBCHAPTER B. ACCESSIBILITY STANDARDS FOR STATE AGENCIES

1 TAC §§213.10 - 213.21

The amendments and new sections are adopted under §2054.052(a), Texas Government Code, which authorizes the department to adopt rules necessary to implement its responsibilities under the Information Resources Management Act, and §2054.453, Texas Government Code, which authorizes the department to adopt rules necessary to implement its responsibilities for the development, procurement, maintenance, and use of electronic and information resources by state agencies to provide access to individuals with disabilities.

§213.21. Accessibility Policy and Coordinator.

(a) Each state agency shall develop and publish an accessibility policy, by June 30, 2009, which includes the standards and specifications of this chapter.

(b) Each state agency's accessibility policy shall include a plan by which all electronic and information resources that are subject to the electronic and information resources accessibility standards will be brought into compliance with the specifications and standards of this chapter.

(c) The department shall develop and publish a standard operating procedure to manage agency non-compliance, including a process for a corrective action plan to remediate non-compliant items identified through an accessibility survey.

(d) Each state agency shall appoint an Accessibility Coordinator to develop, support and maintain their internal accessibility policy.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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SUBCHAPTER C. ACCESSIBILITY STANDARDS FOR INSTITUTIONS OF HIGHER EDUCATION

1 TAC §§213.30 - 213.41

The amendments and new sections are adopted under §2054.052(a), Texas Government Code, which authorizes the department to adopt rules necessary to implement its responsibilities under the Information Resources Management Act, and §2054.453, Texas Government Code, which authorizes the department to adopt rules necessary to implement its responsibilities for the development, procurement, maintenance, and use of electronic and information resources by state agencies to provide access to individuals with disabilities.

§213.41. Accessibility Policy and Coordinator.

(a) Each institution of higher education shall develop and publish an accessibility policy, by June 30, 2009, which includes the standards and specifications of this chapter.

(b) Each institution of higher education's accessibility policy shall include a plan by which all electronic and information resources that are subject to the electronic and information resources accessibility standards will be brought into compliance with the specifications and standards of this chapter.

(c) The department shall develop and publish a standard operating procedure to manage institution of higher education's non-compliance, including a process for a corrective action plan to remediate non-compliant items identified through an accessibility survey.

(d) Each institution of higher education shall appoint an Accessibility Coordinator to develop, support and maintain their internal accessibility policy.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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K. Renee Mauzy
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TITLE 25. HEALTH SERVICES

PART 1. DEPARTMENT OF STATE HEALTH SERVICES

CHAPTER 37. MATERNAL AND INFANT HEALTH SERVICES

SUBCHAPTER G. SPINAL SCREENING PROGRAM

25 TAC §§37.141 - 37.152

The Executive Commissioner of the Health and Human Services Commission (commission) on behalf of the Department of State Health Services (department) adopts amendments to §§37.141 - 37.152, concerning the minimum standards for detection of abnormal spinal curvature in certain school-age children attending public and private schools. The sections are adopted without changes to the proposed text as published in the April 11, 2008, issue of the *Texas Register* (33 TexReg 2903) and, therefore, the sections will not be republished.

BACKGROUND AND PURPOSE

The amendments are necessary to comply with Health and Safety Code, Chapter 37, which requires the department to provide training to screeners for the detection of abnormal spinal curvature and the collection of screening data.

Government Code, §2001.039, requires that each state agency review and consider for readoption each rule adopted by that agency pursuant to the Government Code, Chapter 2001 (Administrative Procedure Act). Sections 37.141 - 37.152 have been reviewed, and the department has determined that reasons for adopting the sections continue to exist because rules on this subject are needed.

SECTION-BY-SECTION SUMMARY

Amendments to §§37.141 - 37.152 include editorial changes, clarification to the rules, and where applicable, changes to the new agency name from the legacy agency name.

An amendment to §37.141 restates and clarifies the purpose of the subchapter.

The amendments to §37.142 and §37.143 change "Texas Department of Health" to "Department of State Health Services."

The amendments to §§37.144, 37.145, 37.146(b), 37.149, and 37.150(b) add new language for clarity, delete superfluous language, and restructure sentences for clarity.

The amendment to §37.147(1) provides the department's current mailing address.

The amendment to §37.148 clarifies how the screening requirements can be met.

The amendment to §37.151 clarifies that the program cannot unilaterally enforce a promise of confidentiality of information pertaining to individuals screened unless also permitted to do so by statute.

The amendment to §37.152 includes the name of the program directly in the nondiscrimination statement.

COMMENTS

The department, on behalf of the commission, did not receive any comments regarding the proposed amendments during the comment period.

LEGAL CERTIFICATION

The Department of State Health Services General Counsel, Lisa Hernandez, certifies that the rules, as adopted, have been reviewed by legal counsel and found to be a valid exercise of the agencies' legal authority.

STATUTORY AUTHORITY

The amendments are authorized by Health and Safety Code, §37.001(c), which mandates adoption of rules necessary to carry out the program; and Government Code, §531.0055, and Health and Safety Code, §1001.075, which authorize the Executive Commissioner of the Health and Human Services Commission to adopt rules and policies necessary for the operation and provision of health and human services by the department and for the administration of Health and Safety Code, Chapter 1001. Review of the rules implements Government Code, §2001.039.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on August 28, 2008.

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Lisa Hernandez
General Counsel
Department of State Health Services
Effective date: September 17, 2008
Proposal publication date: April 11, 2008
For further information, please call: (512) 458-7111 x6972

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TITLE 28. INSURANCE

PART 1. TEXAS DEPARTMENT OF INSURANCE

CHAPTER 5. PROPERTY AND CASUALTY INSURANCE

SUBCHAPTER E. TEXAS WINDSTORM INSURANCE ASSOCIATION

The Commissioner of Insurance adopts amendments to §5.4201 and §5.4501, concerning a new Texas Windstorm Insurance Association (TWIA) endorsement for use with the TWIA Commercial Policy and an update to the existing TWIA rules manual to reflect the availability of the new endorsement. The sections are adopted without change to the proposed text published in the July 4, 2008, issue of the *Texas Register* (33 TexReg 5238).

REASONED JUSTIFICATION. The Insurance Code §2210.001 provides that the purpose of Chapter 2210 of the Insurance Code, the Texas Windstorm Insurance Association Act, is to provide an adequate market for windstorm and hail insurance. Chapter 2210 provides a method by which adequate windstorm and hail insurance may be obtained in catastrophe areas of the state. The TWIA is an association composed of all property insurers authorized to engage in the business of property insurance in Texas. The Insurance Code §2210.203 directs the TWIA to issue on payment of the premium a policy of windstorm and hail insurance as provided by the plan of operation if the TWIA has determined that the property for which an application of insurance coverage is made is insurable property.

The Insurance Code §2210.351 requires that the TWIA must file with the Department modifications of policy and endorsement forms that the TWIA proposes to use and authorizes the Commissioner to approve, disapprove, or modify the modifications of policy forms and endorsements in writing. The Insurance Code §2210.207(e) authorizes the Commissioner, after notice and a hearing, to adopt rules to authorize the TWIA to provide actual cash value coverage instead of replacement cost coverage on the roof covering of a building insured by the TWIA. The Insurance Code §2210.008 authorizes the Commissioner to approve policy forms by order, after notice and a hearing. The Insurance Code §2210.351 also requires that the TWIA must file with the Department each modification of the rules manual it proposes to use and authorizes the Commissioner to approve, disapprove or modify in writing each modification of the rules manual submitted.

The new endorsement and the amendments are necessary to make replacement cost coverage, excluding the roof and roofing materials, available to TWIA insureds and applicants on commercial buildings that would not otherwise qualify for such coverage. Purchase of the new endorsement is at the option of insureds and applicants.

The adoption of amended §5.4201 is necessary to approve a new optional endorsement, Form No. TWIA-165, Replacement Cost Endorsement, Excluding Roof Coverings, for the TWIA Commercial Policy. The new optional commercial endorsement provides replacement cost coverage, excluding roof coverings, for commercial buildings. This new endorsement will be offered to insureds and applicants who have an otherwise insurable commercial structure but are declined replacement cost coverage under Form No. TWIA-164, Replacement Cost Endorsement (Without Deduction for Depreciation) because of the condition of the structure's roof. The adoption of the new endorsement will allow these insureds and applicants to obtain replacement cost coverage for their building, but not for the roof, until the roof is repaired or replaced.

The adoption of amended §5.4501 is necessary to implement an update to the existing TWIA rules manual that reflects the availability of the new commercial endorsement (Rules Manual Section II, Policy Forms and Endorsements, subsection b.(15)).

HOW THE SECTIONS WILL FUNCTION. Section §5.4201 is amended as follows: (i) new subparagraph (F) is added to adopt by reference new Form No. TWIA-165, Replacement Cost Endorsement, Excluding Roof Coverings, effective October 1, 2008, and (ii) existing subparagraphs (F) - (J) are redesignated and adopted as subparagraphs (G) - (K).

The amendment to §5.4501 adopts by reference, effective October 1, 2008, an update to the existing TWIA rules manual to reflect the availability of the new commercial endorsement (Rules Manual Section II, Policy Forms and Endorsements).

SUMMARY OF COMMENTS AND AGENCY RESPONSE.

Comment: One commenter notes that an endorsement providing replacement cost coverage excluding roof coverings currently exists for residential properties and states that the rationale for providing the coverage for commercial properties is the same as the rationale for providing it for residential properties.

Agency Response: The Department appreciates the supportive comment.

NAMES OF THOSE COMMENTING FOR AND AGAINST THE PROPOSAL.

For: Galveston Windstorm Action Committee, Inc.

Against: None.

DIVISION 4. ENDORSEMENTS

28 TAC §5.4201

STATUTORY AUTHORITY. The amendments are adopted pursuant to the Insurance Code Chapter 2210 and §36.001. The Insurance Code §2210.207(e) authorizes the Commissioner, after notice and a hearing, to adopt rules to authorize the TWIA to provide actual cash value coverage instead of replacement cost coverage on the roof covering of a building insured by the TWIA. The Insurance Code §2210.008 authorizes the Commissioner, after notice and hearing, to issue any orders which the Commissioner considers necessary to carry out the purposes of the Insurance Code Chapter 2210, including orders regarding maximum rates, competitive rates, and policy forms. The Insurance Code §2210.351(c) authorizes the Commissioner to approve, modify, or disapprove each rules manual and each modification of the rules manual that the TWIA proposes to use. The Insurance Code §2210.351(b) requires that the TWIA file proposed policy and endorsement forms with the Department along with proposed manuals of classifications, rules, rates, rating plans and each modification of those items that the TWIA proposes to use. The Insurance Code §36.001 authorizes the Commissioner of Insurance to adopt any rules necessary and appropriate to implement the powers and duties of the Texas Department of Insurance under the Insurance Code and other laws of this state.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on August 26, 2008.

TRD-200804623

Gene C. Jarmon
General Counsel and Chief Clerk
Texas Department of Insurance
Effective date: September 15, 2008
Proposal publication date: July 4, 2008
For further information, please call: (512) 463-6327

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DIVISION 6. MANUAL

28 TAC §5.4501

STATUTORY AUTHORITY. The amendments are adopted pursuant to the Insurance Code Chapter 2210 and §36.001. The Insurance Code §2210.207(e) authorizes the Commissioner, after notice and a hearing, to adopt rules to authorize the TWIA to provide actual cash value coverage instead of replacement cost coverage on the roof covering of a building insured by the TWIA. The Insurance Code §2210.008 authorizes the Commissioner, after notice and hearing, to issue any orders which the Commissioner considers necessary to carry out the purposes of the Insurance Code Chapter 2210, including orders regarding maximum rates, competitive rates, and policy forms. The Insurance Code §2210.351(c) authorizes the Commissioner to approve, modify, or disapprove each rules manual and each modification of the rules manual that the TWIA proposes to use. The Insurance Code §2210.351(b) requires that the TWIA file proposed policy and endorsement forms with the Department along with proposed manuals of classifications, rules, rates, rating plans and each modification of those items that the TWIA proposes to use. The Insurance Code §36.001 authorizes the Commissioner of Insurance to adopt any rules necessary and appropriate to implement the powers and duties of the Texas Department of Insurance under the Insurance Code and other laws of this state.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on August 26, 2008.

TRD-200804624
Gene C. Jarmon
General Counsel and Chief Clerk
Texas Department of Insurance
Effective date: September 15, 2008
Proposal publication date: July 4, 2008
For further information, please call: (512) 463-6327

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TITLE 34. PUBLIC FINANCE

PART 4. EMPLOYEES RETIREMENT SYSTEM OF TEXAS

CHAPTER 71. CREDITABLE SERVICE

34 TAC §71.19

The Employees Retirement System of Texas (ERS) adopts amendments to 34 Texas Administrative Code (TAC) §71.19, concerning Transfer of Service between the Teacher Retirement System of Texas (TRS) and the Employees Retirement System of Texas (ERS), without changes to the proposed text as published in the July 11, 2008, issue of the *Texas Register* (33 TexReg 5502), and will not be republished.

Section 71.19 is amended to strengthen safeguards that make certain that all Internal Revenue Service ("IRS") requirements related to retirement are in compliance. When an employee is retiring, the IRS requires that a good faith effort is made to confirm that a bona fide separation from service and termination of employment has taken place. In addition to establishing a minimum time period that the employee is off the employer's payroll, it is also important to the IRS that no promise or agreement to be rehired is in place when the member retires. The IRS may apply the "substance over form" doctrine in the event a person retires, but already has a binding agreement to be rehired. It is possible the IRS would not consider such a retirement to be genuine, and that retirement is not the reality of what is occurring. These rules will also require disclosure of such agreements to ERS at the time of retirement, allowing ERS to cancel any retirement where there is a commitment from the present employer for the retiring employee to be rehired.

No comments were received on the proposed amendments.

The amendment is adopted under the Texas Government Code, §815.102 which provides authorization for the ERS Board of Trustees to adopt rules necessary for the administration of the funds of the retirement system and to transact other business of the Board.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on August 25, 2008.

TRD-200804613
Paula A. Jones
General Counsel
Employees Retirement System of Texas
Effective date: September 14, 2008
Proposal publication date: July 11, 2008
For further information, please call: (512) 867-7288

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CHAPTER 73. BENEFITS

34 TAC §73.7

The Employees Retirement System of Texas (ERS) adopts amendments to 34 Texas Administrative Code (TAC) §73.7, concerning Service in the Month Following Retirement, without changes to the proposed text as published in the July 11, 2008, issue of the *Texas Register* (33 TexReg 5504), and will not be republished.

Section 73.7 is amended to strengthen safeguards that make certain that all Internal Revenue Service ("IRS") requirements related to retirement are in compliance. When an employee is retiring, the IRS requires that a good faith effort is made to confirm that a bona fide separation from service and termination of employment has taken place. In addition to establishing a minimum time period that the employee is off the employer's payroll, it is also important to the IRS that no promise or agreement to be rehired is in place when the member retires. The IRS may apply the "substance over form" doctrine in the event a person retires, but already has a binding agreement to be rehired. It is possible the IRS would not consider such a retirement to be genuine, and

that retirement is not the reality of what is occurring. These rules will also require disclosure of such agreements to ERS at the time of retirement, allowing ERS to cancel any retirement where there is a commitment from the present employer for the retiring employee to be rehired.

No comments were received on the proposed amendments.

The amendment is adopted under the Texas Government Code, §815.102 which provides authorization for the ERS Board of Trustees to adopt rules necessary for the administration of the funds of the retirement system and to transact other business of the Board.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on August 25, 2008.

TRD-200804614
Paula A. Jones
General Counsel
Employees Retirement System of Texas
Effective date: September 14, 2008
Proposal publication date: July 11, 2008
For further information, please call: (512) 867-7288

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TITLE 43. TRANSPORTATION

PART 1. TEXAS DEPARTMENT OF TRANSPORTATION

CHAPTER 15. TRANSPORTATION PLANNING AND PROGRAMMING

SUBCHAPTER B. RESEARCH AND PLANNING CONTRACTS

43 TAC §15.13

The Texas Department of Transportation (department) adopts amendments to §15.13, New Product Evaluation. The amendments to §15.13 are adopted without changes to the proposed text as published in the June 13, 2008, issue of the *Texas Register* (33 TexReg 4661) and will not be republished.

EXPLANATION OF ADOPTED AMENDMENTS

Section 15.13, New Product Evaluation, was adopted to provide procedures for the evaluation of new products and processes that may benefit the department. The section became effective on April 21, 1992. In the last 16 years, evaluation processes have changed but the rule has not. Some provisions of the section are unnecessarily specific and in need of revision. The adopted amendments to §15.13 adapt the section to current situations and technologies and provide the department with the flexibility needed to more quickly evaluate products that are beneficial to transportation.

In the existing section the word "vendor" was artificially defined to mean anyone or any entity who submitted an application. The amendments substitute the word "person" for "vendor" throughout the section because person is more appropriate in the context in which the term is used.

Amendments to §15.13(b), Definitions, add the definition of "executive director" and an expansive definition of "person." The amendments delete the definitions "new product," "product evaluation committee," "specification," "specification committee," and "vendor" because those terms are not used in the section as amended.

Amendments to §15.13(c), Application, specify that an application for product evaluation must be submitted to the executive director or the person who is designated by the executive director to receive the applications and, in recognition that the Internet is commonly used today for distributing information, amendments to §15.13(c)(4) change the source of application forms from central and district offices to the department's Internet site. Because the Internet web links change frequently, the section provides a method by which the application form is easily found.

The amendments delete §15.13(d), Evaluation procedures, and §15.13(e), Vendor notification, to provide flexibility for the evaluation of products. The information concerning the current application and evaluation processes and the specifics of notification will be provided on the department's web site where the application form is found.

Section 15.13(f), Restrictions, is re-lettered accordingly and amended to clarify that a determination that a product is acceptable to the department is not an endorsement of the product by the department or a finding of suitability of the product.

COMMENTS

No comments on the proposed amendments were received.

STATUTORY AUTHORITY

The amendments are adopted under Transportation Code, §201.101, which provides the Texas Transportation Commission with the authority to establish rules for the conduct of the work of the department.

CROSS REFERENCE TO STATUTE

Transportation Code, §§202.001, 203.002, and 224.032.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on August 29, 2008.

TRD-200804687
Bob Jackson
General Counsel
Texas Department of Transportation
Effective date: September 18, 2008
Proposal publication date: June 13, 2008
For further information, please call: (512) 463-8683

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SUBCHAPTER H. TRANSPORTATION CORPORATIONS

43 TAC §15.94

The Texas Department of Transportation (department) adopts new §15.94, CDA Projects Corporation, concerning transportation corporations. New §15.94 is adopted with changes to the proposed text as published in the July 11, 2008, issue of the *Texas Register* (33 TexReg 5511).

EXPLANATION OF ADOPTED NEW SECTION

The Texas Transportation Commission (commission) is currently undertaking competitive procurement processes under the comprehensive development agreements law (Transportation Code, Chapter 223, Subchapter E) for the North Tarrant Expressway and the I-635 Managed Lanes projects, among others. Federal law now authorizes the use of private activity bonds, which can substantially lower the cost of borrowing, for certain transportation projects, and thus the financing methodology proposed for the comprehensive development agreement for each project will likely include the use of proceeds from the issuance of private activity bonds. It is anticipated that the private activity bonds will be issued by a corporation acting on behalf of the commission, and the new section provides for the creation of a limited purpose corporation with the specific authority to issue the bonds, subject to commission approval, as provided by Transportation Code, Chapter 431.

New §15.94, CDA Projects Corporation, authorizes the creation of a corporation with the authority to issue private activity bonds for transportation projects developed or to be developed under comprehensive development agreements, as approved by the commission.

COMMENTS

No comments on the proposed new section were received. The department became aware of the potential need to issue private activity bonds for the financing or refinancing of transportation projects that have been developed. The proposed language which read "transportation projects to be developed under comprehensive development agreements" was changed to "transportation projects developed or to be developed under comprehensive development agreements."

STATUTORY AUTHORITY

The new section is adopted under Transportation Code, §201.101, which provides the commission with the authority to establish rules for the conduct of the work of the department, and more specifically, Transportation Code, §223.201, which authorizes the commission to enter into comprehensive development agreements, and Transportation Code, §431.023, which authorizes the commission to approve the creation of a transportation corporation.

CROSS REFERENCE TO STATUTE

Transportation Code, Chapter 223, Subchapter E and Transportation Code, Chapter 431.

§15.94. CDA Projects Corporation.

(a) The commission by order may authorize the creation of a corporation under the Act for the sole purpose of issuing private activity bonds for transportation projects developed or to be developed under comprehensive development agreements (CDA) entered into by the department under Transportation Code, Chapter 223, Subchapter E.

(b) The creation, dissolution, and all powers, duties, and functions of the corporation are governed by the Act and the other sections of this subchapter do not apply, except as provided by this section.

(c) Only a full-time, permanent employee of the department may be appointed or serve as a director of the corporation.

(d) Section 15.86 of this subchapter, relating to conflict of interest, applies to the directors and employees of the corporation.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on August 29, 2008.

TRD-200804688
Bob Jackson
General Counsel
Texas Department of Transportation
Effective date: September 18, 2008
Proposal publication date: July 11, 2008
For further information, please call: (512) 463-8683

REVIEW OF AGENCY RULES

This section contains notices of state agency rules review as directed by the Texas Government Code, §2001.039. Included here are (1) notices of *plan to review;* (2) notices of *intention to review,* which invite public comment to specified rules; and (3) notices of *readoption,* which summarize public comment to specified rules. The complete text of an agency's *plan to review* is available after it is filed with the Secretary of State on the Secretary of State's web site (http://www.sos.state.tx.us/texreg). The complete text of an agency's rule being reviewed and considered for *readoption* is available in the *Texas Administrative* Code on the web site (http://www.sos.state.tx.us/tac).

For questions about the content and subject matter of rules, please contact the state agency that is reviewing the rules. Questions about the web site and printed copies of these notices may be directed to the *Texas Register* office.

Agency Rule Review Plan

Texas Alcoholic Beverage Commission

Title 16, Part 3

TRD-200804722

Filed: September 2, 2008

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Proposed Rule Review

Texas Department of Transportation

Title 43, Part 1

In accordance with Government Code, §2001.039, the Texas Department of Transportation (department) files this notice of intention to review Title 43 TAC, Part 1, Chapter 24, Trans-Texas Corridor, and Chapter 26, Regional Mobility Authorities.

The department will accept comments regarding whether the reasons for adopting these rules continue to exist. The comment period will last 30 days beginning with the publication of this notice of intention to review.

Comments regarding this rule review may be submitted in writing to Bob Jackson, General Counsel, Texas Department of Transportation, 125 East 11th Street, Austin, Texas 78701-2483.

TRD-200804689

Bob Jackson

General Counsel

Texas Department of Transportation

Filed: August 29, 2008

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Adopted Rule Review

Texas Department of Transportation

Title 43, Part 1

The Texas Department of Transportation (department) files notice of the completion of review and the readoption of Title 43 TAC, Part 1, Chapter 21, Right of Way.

This review and readoption has been conducted in accordance with Government Code, §2001.039. The Texas Transportation Commission (commission) has reviewed these rules and determined that the reasons for adopting them continue to exist. The department received no comments on the proposed rule review, which was published in the June 6, 2008, issue of the *Texas Register* (33 TexReg 4533).

Independent of this review, the commission contemporaneously proposes amendments to §21.31, §21.35, §§21.37 - 21.40, §§21.52 - 21.55, §21.902, and §21.905 all relating to utility accommodation as published elsewhere in this issue of the *Texas Register*.

This concludes the review of Chapter 21.

Questions regarding this rule review may be submitted in writing to Bob Jackson, General Counsel, Texas Department of Transportation, 125 East 11th Street, Austin, Texas 78701-2483, or by phone at (512) 463-8630.

TRD-200804690

Bob Jackson

General Counsel

Texas Department of Transportation

Filed: August 29, 2008

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IN ADDITION

The *Texas Register* is required by statute to publish certain documents, including applications to purchase control of state banks, notices of rate ceilings issued by the Office of Consumer Credit Commissioner, and consultant proposal requests and awards. State agencies also may publish other notices of general interest as space permits.

State Office of Administrative Hearings

Notice of Public Hearing

The State Office of Administrative Hearings (SOAH) will conduct a public hearing on Friday, September 19, 2008, and on Friday, September 26, 2008. Both hearings will begin at 10:00 a.m. in Room 404 of the William P. Clements Building, 300 W. 15th Street (15th and Lavaca), Austin, Texas.

SOAH will hear public comment on proposed rules and rules proposed to be repealed at 1 Texas Administrative Code (TAC) Chapter 159 (concerning the rules of procedure for license suspension hearings). The proposed rules were published in the *Texas Register* on July 4, 2008 (33 TexReg 5107; *see also* http://www.sos.state.tx.us/texreg/pdf/backview/0704/index.shtml), and may be viewed on SOAH's website at http://www.soah.state.tx.us. The comment period for the rules closed as of August 3, 2008; however, additional comments will be accepted at the public hearings.

SOAH's field offices in Corpus Christi, Dallas, El Paso, Fort Worth, Houston, Lubbock, San Antonio, and Waco will be connected to the September 19 and 26 hearings by videoconference. Those who wish to offer comment on the rules without traveling to Austin may do so via the videoconference.

So that SOAH can plan and prepare for the comment hearing, SOAH requests that persons wishing to offer comment at the September 19 or 26 hearings via videoconference notify the field office at which the person will appear of his or her intent to attend the comment hearing via videoconference. Notification may be accomplished in one of the following two ways: 1) Each field office has a sign-up sheet available on which prospective commenters may signify their intent to appear at the comment hearing via videoconference; or 2) Prospective commenters may contact the particular field office by telephone to advise the staff there of the intent to appear at the comment hearing via videoconference.

SOAH will take comment from anyone who appears on September 19 or 26 at the comment hearing, even if the person has not previously notified the field office of the intent to appear, but SOAH would appreciate knowing approximately how many people intend to comment from each office so that we may assure the comment hearing runs smoothly, efficiently, and without technical difficulty.

SOAH offers reasonable accommodations for persons attending meetings, hearings, or educational events, as required by the Americans with Disabilities Act. If you require special accommodations, please contact SOAH's Docketing office at (512) 475-3445 a minimum of two days prior to the hearing date.

For further information regarding this notice, you may contact Kerry Sullivan, General Counsel, at (512) 475-4993.

TRD-200804734
Kerry D. Sullivan
General Counsel
State Office of Administrative Hearings
Filed: September 3, 2008

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Coastal Coordination Council

Notice and Opportunity to Comment on Requests for Consistency Agreement/Concurrence Under the Texas Coastal Management Program

On January 10, 1997, the State of Texas received federal approval of the Coastal Management Program (CMP) (62 Federal Register pp. 1439 - 1440). Under federal law, federal agency activities and actions affecting the Texas coastal zone must be consistent with the CMP goals and policies identified in 31 TAC Chapter 501. Requests for federal consistency review were deemed administratively complete for the following project(s) during the period of August 22, 2008, through August 28, 2008. As required by federal law, the public is given an opportunity to comment on the consistency of proposed activities in the coastal zone undertaken or authorized by federal agencies. Pursuant to 31 TAC §§506.25, 506.32, and 506.41, the public comment period for this activity extends 30 days from the date published on the Coastal Coordination Council web site. The notice was published on the web site on September 3, 2008. The public comment period for this project will close at 5:00 p.m. on October 3, 2008.

FEDERAL AGENCY ACTIONS:

Applicant: AYCO Energy Partners, Ltd.; Location: The project is located centrally within the McFaddin National Wildlife Refuge, approximately 1.1 miles north of the coast, in Jefferson County, Texas. The project can be located on the U.S.G.S. quadrangle map entitled: Star Lake, Texas. Approximate UTM Coordinates in NAD 27 (meters): Zone 15; Easting: 389278; Northing: 3282779. Project Description: The applicant proposes perform oil and gas exploration and production activities within and/or adjacent to the McFaddin National Wildlife Refuge (Refuge). The project consists of a series of three proposed oil and gas drilling locations (two on-Refuge and one off-Refuge within uplands), including access roads, associated pipelines, and two production facilities (one on-Refuge and one off-Refuge). Permanent impacts associated with the proposed project will be 18.61 acres of wetlands, and the temporary impacts will be 15.54 acres of wetlands. CCC Project No.: 08-0225-F1. Type of Application: U.S.A.C.E. permit application #SWG-2007-01280 is being evaluated under §10 of the Rivers and Harbors Act of 1899 (33 U.S.C.A. §403) and §404 of the Clean Water Act (33 U.S.C.A. §1344). Note: The consistency review for this project may be conducted by the Railroad Commission of Texas under §401 of the Clean Water Act (33 U.S.C.A. §1344).

Pursuant to §306(d)(14) of the Coastal Zone Management Act of 1972 (16 U.S.C.A. §§1451 - 1464), as amended, interested parties are invited to submit comments on whether a proposed action is or is not consistent with the Texas Coastal Management Program goals and policies and whether the action should be referred to the Coastal Coordination Council for review.

Further information on the applications listed above, including a copy the consistency certifications for inspection, may be obtained from Ms. Tammy Brooks, Consistency Review Coordinator, Coastal Coordination Council, P.O. Box 12873, Austin, Texas 78711-2873,

or tammy.brooks@glo.state.tx.us. Comments should be sent to Ms. Brooks at the above address or by fax at (512) 475-0680.

TRD-200804695
Larry L. Laine
Chief Clerk/Deputy Land Commissioner, General Land Office
Coastal Coordination Council
Filed: August 29, 2008

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Texas Education Agency

Correction of Error

The State Board of Education adopted amendments and new sections in 19 TAC Chapter 110, Texas Essential Knowledge and Skills for English Language Arts and Reading, Subchapter A, Elementary, Subchapter B, Middle School, and Subchapter C, High School. The notices of adoption were published in the August 29, 2008, issue of the *Texas Register* (33 TexReg 7162).

There is a typographical error in Subchapter A, §110.15(b)(14)(C), on page 7187. A comma was omitted after the "e.g." abbreviation. The phrase should read as follows: "(e.g., language in an informal e-mail vs. language in a web-based news article)."

A typographical error occurs in Subchapter C, §§110.31 - 110.34, the Texas Essential Knowledge and Skills for English I-IV. In subsection (b)(15)(A)(ii), a comma was inadvertently placed after the word "devices" in the phrase, "rhetorical devices, and transitions between paragraphs." This typographical error appears in subsection (b)(15)(A)(ii) in §§110.31 - 110.34 on pages 7205, 7208, 7211, and 7215, respectively. The phrase should read as follows: "rhetorical devices and transitions between paragraphs."

TRD-200804735

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Employees Retirement System of Texas

Request for Proposals - State of Texas Deferred Compensation Program

In accordance with Chapter 609, §609.509 of the Gov't Code, the Board of Trustees ("Board") of the Employees Retirement System of Texas ("ERS") is authorized to contract for the necessary goods and consolidated billing, accounting, and other services provided with a deferred compensation plan. ERS is issuing a Request for Proposals ("RFP") seeking to identify one or more experienced and qualified vendors ("Vendors") to provide the state of Texas Texa$aver Deferred Compensation Program ("Texa$aver" or "Program") with one or more of the following: (i) Third Party Administrative ("TPA" or "Record-Keeper") services; (ii) Advisory ("Advice") services; and (iii) Custodial ("Custodian") services. Texas law prohibits the TPA from offering proprietary products to Program participants. Vendors currently offering proprietary products in the Program must agree to discontinue these offerings and cooperate with the transition of such products as required by ERS, if awarded a Contractual Agreement to provide TPA services.

Qualified Vendors may respond to one or more parts of this RFP as discussed in greater detail in the RFP document. Following ERS' selection of qualified Vendor(s) to provide these services, responsibilities will begin September 1, 2009 for Plan Year 2010 and continue for a four year period through August 31, 2013, subject to the terms of the parties' contract. At ERS' sole discretion, a contractual option to renew for additional terms may be offered. Qualified Vendor(s) must provide the level of services required in the RFP and meet other requirements that are in the best interest of the Texa$aver Program, its participants, and ERS. Further, Vendor(s) shall be required to execute a Contractual Agreement ("Contract"), provided by and satisfactory to ERS, relating to all services to be provided.

A Vendor wishing to respond to this request shall meet all of the following minimum requirements to be considered: 1) maintain its principal place of business in the United States of America and shall have a Series 6 certification, 2) have been providing TPA/Record-keeping, and/or Advice, and/or Custodian services for either 457 or 401(k) plans for at least two (2) large employers, consisting of a minimum of 50,000 participants with at least $500 million in assets ("large program") since January 1, 2003, 3) since January 1, 2003, demonstrate successful transition capabilities by evidencing at least two (2) large program transitions that provided services and products (TPA/Record-keeping and Advice, and/or Custodian) for either 457 or 401(k) plans, 4) evidence a successful track-record of implementing technological advancements to enhance participant services, to include auto enrollment processes, and 5) have a current net worth available, on average, throughout its 2007 financial period of: $25 million for the TPA, $1 million for Advice services, and $50 million for Custodian services, as evidenced by a 2007 audited financial statement. If a Vendor intends to bid on a combination of any services offered, they shall be capable of evidencing an ability to meet the cumulative average net worth sum for the total of those services.

The Contractual Agreement(s) must be signed in *blue ink,* with all required exhibits completed and attached and without amendment or revision, by a duly authorized officer and returned with the Vendor's proposal. While the RFP does not require the Vendor to provide all the referenced Deferred Compensation Program services, preferential consideration may be given to a qualified Vendor(s) providing the most comprehensive program of Deferred Compensation services. A qualified Vendor(s) may submit a proposal and bid response materials to provide services for one, two, or all three services.

The RFP will be available on or after September 23, 2008 from ERS' website. To access the secured portion of the RFP website, interested Vendors must email their request to the attention of IVendor Mailbox at: **ivendorquestions@ers.state.tx.us.** The email request must include the Vendor's legal name, street address, phone and fax numbers, and email address for the organization's direct point of contact. Upon receipt of your emailed request, a user ID and password will be issued to the requesting organization that will permit access to the secured RFP. General questions concerning the RFP should be sent to the IVendor Mailbox as well. Inquires and responses, if applicable, are updated frequently.

The RFP will be discussed at a web conference on October 21, 2008, beginning at 2:00 p.m. (CT). Vendors are required to register for participation in the web conference no later than 4:00 p.m. (CT) on October 16, 2008, by emailing an acknowledgment to the IVendor Mailbox as referenced above.

To be eligible for consideration, the Vendor is required to submit a total of seven (7) sets of the proposal. One (1) "Original" with the fully executed Contractual Agreement *signed in blue ink,* and without amendment or revision with all required completed exhibits attached and an additional three (3) bound duplicates of the proposal, including all required exhibits must be provided in printed format. The remaining three (3) copies must be submitted in CD-ROM format using Word or Excel applications (no information submitted in PDF format, except for marketing or communication materials, will be accepted). All materials must be executed as noted above and must be received by ERS by 12:00 Noon (CT) on November 18, 2008.

ERS will base its evaluation and selection on the basis of demonstrated competence, compliance with the RFP and qualifications to perform the services for a fair and reasonable price. The professional fees under any contract must be consistent with and not higher than the recommended practices and fees published by the applicable professional associations and may not exceed any maximum provided by law. Further, the Vendor will be evaluated on factors including, but not limited to the following, which are not necessarily listed in order of priority; compliance with and adherence to the RFP and execution of the Contractual Agreement(s); minimum requirements and preferred criteria as specified; fee proposal and program fees; operating requirements; references; administrative quality; experience serving large group programs and other relevant criteria, as determined during the evaluation process. Each proposal will be evaluated both individually and relative to the proposal of other qualified and experienced Vendors. Complete specifications will be included with the RFP.

ERS reserves the right to reject any and/or all proposals and/or call for new proposals if deemed by ERS to be in the best interests of the Texa$aver Program, its participants or ERS. ERS also reserves the right to reject any proposal submitted that does not fully comply with the RFP's instructions and criteria. ERS is under no legal requirement to execute a Contractual Agreement on the basis of this notice or upon issuance of the RFP and will not pay any costs incurred by any entity in responding to this notice or the RFP or in connection with the preparation thereof. ERS specifically reserves the right to vary all provisions set forth at any time prior to execution of a contract where ERS deems it to be in the best interest of the Texa$aver Program, its participants, ERS, or the state of Texas.

TRD-200804710
Paula A. Jones
General Counsel
Employees Retirement System of Texas
Filed: September 2, 2008

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Texas Commission on Environmental Quality

Agreed Orders

The Texas Commission on Environmental Quality (TCEQ or commission) staff is providing an opportunity for written public comment on the listed Agreed Orders (AOs) in accordance with Texas Water Code (the Code), §7.075. Section 7.075 requires that before the commission may approve the AOs, the commission shall allow the public an opportunity to submit written comments on the proposed AOs. Section 7.075 requires that notice of the proposed orders and the opportunity to comment must be published in the *Texas Register* no later than the 30th day before the date on which the public comment period closes, which in this case is **October 13, 2008.** Section 7.075 also requires that the commission promptly consider any written comments received and that the commission may withdraw or withhold approval of an AO if a comment discloses facts or considerations that indicate that consent is inappropriate, improper, inadequate, or inconsistent with the requirements of the statutes and rules within the commission's jurisdiction or the commission's orders and permits issued in accordance with the commission's regulatory authority. Additional notice of changes to a proposed AO is not required to be published if those changes are made in response to written comments.

A copy of each proposed AO is available for public inspection at both the commission's central office, located at 12100 Park 35 Circle, Building C, 1st Floor, Austin, Texas 78753, (512) 239-1864 and at the applicable regional office listed as follows. Written comments about an AO should be sent to the enforcement coordinator designated for each AO at the commission's central office at P.O. Box 13087, Austin, Texas 78711-3087 and must be **received by 5:00 p.m. on October 13, 2008.** Written comments may also be sent by facsimile machine to the enforcement coordinator at (512) 239-2550. The commission enforcement coordinators are available to discuss the AOs and/or the comment procedure at the listed phone numbers; however, §7.075 provides that comments on the AOs shall be submitted to the commission in **writing.**

(1) COMPANY: Arkema Inc.; DOCKET NUMBER: 2008-0792-AIR-E; IDENTIFIER: RN100209444; LOCATION: Houston, Harris County; TYPE OF FACILITY: chemical manufacturing plant; RULE VIOLATED: 30 Texas Administrative Code (TAC) §116.115(c), Air Permit Number 22100, Special Condition (SC) Number 1, and Texas Health and Safety Code (THSC), §382.085(b), by failing to prevent unauthorized emissions; and 30 TAC §101.201(f) and THSC, §382.085(b), by failing to respond to a request for additional information; PENALTY: $3,874; ENFORCEMENT COORDINATOR: Nadia Hameed, (713) 767-3500; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1452, (713) 767-3500.

(2) COMPANY: Arrow Marble L.L.C.; DOCKET NUMBER: 2008-0645-AIR-E; IDENTIFIER: RN100873108; LOCATION: Houston, Harris County; TYPE OF FACILITY: cultured marble products manufacturing plant; RULE VIOLATED: 30 TAC §122.143(4) and §122.145(2)(A) and (C), Federal Operating Permit (FOP) Number O-02631, General Terms and Conditions, and THSC, §382.085(b), by failing to submit semi-annual deviation reports; and 30 TAC §116.115(b)(2)(F) and §122.143(4), Air Permit Number 47669, General Condition Number 8, FOP Number O-02631, SC Number 7, and THSC, §382.085(b), by failing to comply with the maximum allowable emission rate table (MAERT) for styrene and methylmethacrylate; PENALTY: $20,250; ENFORCEMENT COORDINATOR: Tom Jecha, (512) 239-2576; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1452, (713) 767-3500.

(3) COMPANY: Bell Bottom Foundation Company; DOCKET NUMBER: 2008-0631-PST-E; IDENTIFIER: RN101824399; LOCATION: Pearland, Brazoria County; TYPE OF FACILITY: property with underground storage tanks (USTs); RULE VIOLATED: 30 TAC §334.47(a)(2), by failing to permanently remove from service, no later than 60 days after the prescribed implementation date, four USTs; PENALTY: $9,500; ENFORCEMENT COORDINATOR: Ross Fife, (512) 239-2541; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1452, (713) 767-3500.

(4) COMPANY: Caro Water Supply Corporation; DOCKET NUMBER: 2008-0761-PWS-E; IDENTIFIER: RN101184141; LOCATION: Nacogdoches County; TYPE OF FACILITY: public water supply; RULE VIOLATED: 30 TAC §290.41(c)(1)(F), by failing to secure a sanitary control easement; 30 TAC §290.45(b)(1)(D)(i) and THSC, §341.0315(c), by failing to provide two or more wells having a total capacity of 0.6 gallons per minute (gpm) per connection; 30 TAC §290.45(b)(1)(D)(ii) and THSC, §341.0315(c), by failing to provide a total storage capacity of 200 gallons per connection; 30 TAC §290.45(b)(1)(D)(iii) and THSC, §341.0315(c), by failing to provide two or more pumps that have a total capacity of two gpm per connection; 30 TAC §290.45(b)(1)(D)(iv) and THSC, §341.0315(c), by failing to provide a total pressure tank capacity of 20 gallons per connection; 30 TAC §290.43(c)(4), by failing to provide an operable water level indicator on the ground storage tanks; 30 TAC §290.46(v), by failing to ensure that all electrical wiring is securely installed in compliance with a local or national electrical code; 30 TAC §290.44(h)(4), by failing to ensure backflow prevention assemblies which are installed to provide protection against health hazards are tested and certified to be operating within specifications at least annually; 30 TAC §290.46(s)(1), by failing to calibrate the water system's well

meters; and 30 TAC §290.46(f)(2) and (3)(B)(vi), by failing to compile and maintain records of water works operations and maintenance activities; PENALTY: $2,312; ENFORCEMENT COORDINATOR: Andrea Linson-Mgbeoduru, (512) 239-1482; REGIONAL OFFICE: 3870 Eastex Freeway, Beaumont, Texas 77703-1830, (409) 898-3838.

(5) COMPANY: Jose Granados; DOCKET NUMBER: 2007-1541-MSW-E; IDENTIFIER: RN105234058; LOCATION: La Joya, Hidalgo County; TYPE OF FACILITY: unauthorized disposal site; RULE VIOLATED: 30 TAC §330.15(c) and §330.103(b), by failing to transport and dispose of municipal solid waste at an authorized facility; PENALTY: $7,500; ENFORCEMENT COORDINATOR: Colin Barth, (512) 239-0086; REGIONAL OFFICE: 1804 West Jefferson Avenue, Harlingen, Texas 78550-5247, (956) 425-6010.

(6) COMPANY: City of Granger; DOCKET NUMBER: 2008-1017-PWS-E; IDENTIFIER: RN102834371; LOCATION: Granger, Williamson County; TYPE OF FACILITY: public water supply; RULE VIOLATED: 30 TAC §290.46(e) and THSC, §341.033(a), by failing to operate the production, treatment, and distribution facilities at the public water system under direct supervision of a water works operator; 30 TAC §290.46(f)(3)(A)(iv), by failing to maintain a record of the dates that dead-end mains were flushed; 30 TAC §290.41(c)(1)(F), by failing to secure a sanitary control easement; 30 TAC §290.41(c)(3)(O), by failing to provide an intruder-resistant fence to protect the system's well; and 30 TAC §290.46(j), by failing to complete and maintain customer service inspection certificates; PENALTY: $525; ENFORCEMENT COORDINATOR: Yuliya Dunaway, (210) 490-3096; REGIONAL OFFICE: 2800 South IH 35, Suite 100, Austin, Texas 78704-5700, (512) 339-2929.

(7) COMPANY: Micobe, Inc.; DOCKET NUMBER: 2008-0704-WQ-E; IDENTIFIER: RN102573326; LOCATION: Gatesville, Coryell County; TYPE OF FACILITY: industrial site; RULE VIOLATED: 30 TAC §281.25(a)(4) and 40 Code of Federal Regulations §122.26(c), by failing to obtain authorization to discharge storm water associated with industrial activities; PENALTY: $2,100; ENFORCEMENT COORDINATOR: Heather Brister, (254) 751-0335; REGIONAL OFFICE: 6801 Sanger Avenue, Suite 2500, Waco, Texas 76710-7826, (254) 751-0335.

(8) COMPANY: Mobile Mini I, Inc.; DOCKET NUMBER: 2008-0957-AIR-E; IDENTIFIER: RN100739275; LOCATION: Dallas, Dallas County; TYPE OF FACILITY: mobile storage container assembly plant; RULE VIOLATED: 30 TAC §116.110(a)(1) and THSC, §382.085(b) and §382.0518(a), by failing to obtain a New Source Review Permit; PENALTY: $2,100; ENFORCEMENT COORDINATOR: James Nolan, (512) 239-6634; REGIONAL OFFICE: 2301 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(9) COMPANY: MURPHY OIL USA, INC. dba Murphy USA 5708; DOCKET NUMBER: 2008-0816-PST-E; IDENTIFIER: RN102264322; LOCATION: West Orange, Orange County; TYPE OF FACILITY: convenience store with retail sales of gasoline; RULE VIOLATED: 30 TAC §334.8(c)(5)(A)(ii), by failing to make immediately available a valid, current TCEQ delivery certificate; and 30 TAC §115.246(4) and THSC, §382.085(b), by failing to maintain Stage II records; PENALTY: $6,000; ENFORCEMENT COORDINATOR: Tom Greimel, (512) 239-5690; REGIONAL OFFICE: 3870 Eastex Freeway, Beaumont, Texas 77703-1830, (409) 898-3838.

(10) COMPANY: US Department of the Army; DOCKET NUMBER: 2008-0757-AIR-E; IDENTIFIER: RN101612083; LOCATION: Killeen, Bell County; TYPE OF FACILITY: military installation; RULE VIOLATED: 30 TAC §122.145(2)(B) and THSC, §382.085(b), by failing to submit a timely semi-annual deviation report; PENALTY: $4,750; Supplemental Environmental Project (SEP) offset amount of $3,800 applied to Texas Parent Teacher Association - Clean School Bus Program; ENFORCEMENT COORDINATOR: Tom Jecha, (512) 239-2576; REGIONAL OFFICE: 6801 Sanger Avenue, Suite 2500, Waco, Texas 76710-7826, (254) 751-0335.

TRD-200804709
Kathleen C. Decker
Director, Litigation Division
Texas Commission on Environmental Quality
Filed: September 2, 2008

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Notice of Opportunity to Comment on Agreed Orders of Administrative Enforcement Actions

The Texas Commission on Environmental Quality (TCEQ or commission) staff is providing an opportunity for written public comment on the listed Agreed Orders (AOs) in accordance with Texas Water Code (TWC), §7.075. Section 7.075 requires that before the commission may approve the AOs, the commission shall allow the public an opportunity to submit written comments on the proposed AOs. Section 7.075 requires that notice of the opportunity to comment must be published in the *Texas Register* no later than the 30th day before the date on which the public comment period closes, which in this case is **October 13, 2008**. Section 7.075 also requires that the commission promptly consider any written comments received and that the commission may withdraw or withhold approval of an AO if a comment discloses facts or considerations that indicate that consent is inappropriate, improper, inadequate, or inconsistent with the requirements of the statutes and rules within the commission's jurisdiction or the commission's orders and permits issued in accordance with the commission's regulatory authority. Additional notice of changes to a proposed AO is not required to be published if those changes are made in response to written comments.

A copy of each proposed AO is available for public inspection at both the commission's central office, located at 12100 Park 35 Circle, Building A, 3rd Floor, Austin, Texas 78753, (512) 239-3400 and at the applicable regional office listed as follows. Written comments about an AO should be sent to the attorney designated for the AO at the commission's central office at P.O. Box 13087, MC 175, Austin, Texas 78711-3087 and must be **received by 5:00 p.m. on October 13, 2008**. Comments may also be sent by facsimile machine to the attorney at (512) 239-3434. The designated attorney is available to discuss the AO and/or the comment procedure at the listed phone number; however, §7.075 provides that comments on an AO shall be submitted to the commission in **writing**.

(1) COMPANY: Amin Makhani dba Corner Food Mart; DOCKET NUMBER: 2007-1603-SPT-E; TCEQ ID NUMBER: RN102783867; LOCATION: 2300 Northeast Loop 410, San Antonio, Bexar County, Texas; TYPE OF FACILITY: convenience store with retail sales of gasoline; RULES VIOLATED: 30 TAC §334.10(b), by failing to maintain underground storage tank (UST) records and make them immediately available for inspection upon request by TCEQ staff; and 30 TAC §334.8(c)(5)(C), by failing to ensure that a legible tag, label, or marking with the tank number is permanently applied upon or affixed to either the top of the fill tube or to a non-removable point in the immediate area of the fill tube according to the UST registration and self-certification form; PENALTY: $2,100; STAFF ATTORNEY: Anna Cox, Litigation Division, MC 175, (512) 239-0974; REGIONAL OFFICE: San Antonio Regional Office, 14250 Judson Road, San Antonio, Texas 78233-4480, (210) 490-3096.

(2) COMPANY: Chevron Phillips Chemical Company LP; DOCKET NUMBER: 2006-1598-AIR-E; TCEQ ID NUMBER: RN100209857;

LOCATION: 2001 Gulfway Drive, Port Arthur, Jefferson County, Texas; TYPE OF FACILITY: petrochemicals manufacturing plant; RULES VIOLATED: 30 TAC §106.261(a)(7)(A) and §122.143(4); Federal Operating Permit (FOP) Number 1235, Special Condition (SC) Number 21, and Texas Health and Safety Code (THSC), §382.085(b), by failing to limit emissions to the permit by rule (PBR) authorizations; 30 TAC §§101.20(1) and (2), 113.130, 113.520, 115.352(4), 116.115(c) and 122.143(4), 40 Code of Federal Regulations (CFR) §§60.482-6(a)(1), 61.112(a), 63.1033(b)(1) and 63.167(a)(1), FOP Number 1235, SC Number 21 and Air Permit Number 21101, SC Number 1A, and THSC, §382.085(b), by failing to equip each open-ended line with a cap, blind flange, plug, or a second valve; 30 TAC §§106.452(2)(D) and (E), 116.110(a)(4) and 122.143(4), FOP Number 1235, SC Number 21 and THSC, §382.085(b), by failing to register an outside blast cleaning facility with the TCEQ using Form PI-7 and failing to receive written site approval from the executive director prior to construction; 30 TAC §106.8(c)(5) and §122.143(4), FOP Number 1235 SC Number 21 and THSC, §382.085(b), by failing to maintain records required for PBRs; 30 TAC §117.205(f)(3) and §122.143(4), FOP Number 1235, SC Number 1A and THSC, §382.085(b), by failing to comply with carbon monoxide (CO) emission limitations at Boiler BA-118; 30 TAC §§106.1, 106.6(b) and (c) and 122.143(4), FOP 1235, SC Number 21 and THSC, §382.085(b), by failing to comply with the maximum emission rates as certified in the application for a PBR; and 30 TAC §§101.20(1), 106.6(b) and (c), 115.354(2) and 122.143(4), FOP Number 1235, SC Number 21 and 40 CFR §60.482-7(a) and THSC, §382.085(b), by failing to monitor fugitive components as required by the applicable PBR; PENALTY: $92,677; Supplemental Environment Project (SEP) offset amount of $46,338 applied to Southeast Texas Regional Planning Commission West Port Arthur Home Energy Efficiency Project; STAFF ATTORNEY: Laurencia Fasoyiro, Litigation Division, MC R-12, (713) 422-8914; REGIONAL OFFICE: Beaumont Regional Office, 3870 Eastex Freeway, Beaumont, Texas 77703-1830, (409) 898-3838.

(3) COMPANY: Chevron Phillips Chemical Company LP; DOCKET NUMBER: 2006-1960-AIR-E; TCEQ ID NUMBER: RN103919817; LOCATION: 9500 Interstate 10 East, Baytown, Harris County, Texas; TYPE OF FACILITY: chemical manufacturing plant; RULES VIOLATED: 30 TAC §116.115(c), Permit Number 1504A, SC Number 1 and THSC, §382.085(b), by failing to prevent unauthorized emissions; 30 TAC §115.352(4) and §116.115(c), Air Permit Number 19027, SC Number 20(E), 40 CFR §60.482-6(a)(1) and THSC, §382.085(b), by failing to properly seal open-ended lines; and 30 TAC §§115.354(2)(A), 115.781(b) and 116.115(c), Permit Number 19027, SC Numbers 20(F), 20(G) and 21(A), 40 CFR §60.482-7(a) and §60.562-2(a), and THSC, §382.085(b), by failing to monitor components that were in volatile organic compound service at the PEU-1796 Unit; PENALTY: $47,442; SEP offset amount of $23,721 applied to Houston-Galveston Area Emission Reduction Credit Organization Clean Cities/Clean Vehicles Program; STAFF ATTORNEY: Laurencia Fasoyiro, Litigation Division, MC R-12, (713) 422-8914; REGIONAL OFFICE: Houston Regional Office, 5425 Polk Street, Suite H, Houston, Texas 77023, (713) 767-3500.

(4) COMPANY: Chevron Phillips Chemical Company LP; DOCKET NUMBER: 2007-0286-AIR-E; TCEQ ID NUMBER: RN100825249; LOCATION: 21689 Highway 35 in Old Ocean, Brazoria County, Texas; TYPE OF FACILITY: chemical manufacturing plant; RULES VIOLATED: 30 TAC §101.201(b) and §122.143(4), Air Permit Number O-02151, SC Number 2F and THSC, §382.085(b), by failing to create a final record for a non-reportable emissions event, within two weeks after the end of the emissions event; 30 TAC §115.355(1) and §122.143(4), Air Permit Number O-02151, SC Number 1A, 40 CFR §60.485(b) and THSC, §382.085(b), by failing to conduct leak detection and repair monitoring in accordance with 40 CFR Part 60, Appendix A, Method 21; 30 TAC §§ 115.352(3), 115.782(a), 116.715(a) and 122.143(4), Air Permit Number O-02151, SC Numbers 1A and 16A, Air Permit Number 22690 and PSD-TX-751M1, SC Number 14H and THSC, §382.085(b), by failing to adequately identify leaking components site wide from October 4, 2005 to October 20, 2005; 30 TAC §116.715(a) and §122.143(4), Air Permit Number 22690 and PSD-TX-751M1, SC Number 19, 40 CFR §60.18(c)(2) and THSC, §382.085(b), 30 TAC §116.715(a) and §122.143(4), Air Permit Number 22690 and PSD-TX-751M1, SC Numbers 11 and 12B, and THSC, §382.085(b), by failing to maintain a constant pilot flame at all times; by failing to conduct calibrations for Continuous Emission Monitoring System; 30 TAC §117.206(e)(1)(A), and THSC, §382.085(b), by failing to prevent the 24-hour rolling average concentration of carbon monoxide emissions from exceeding 400 parts per million by volume at 3.0% oxygen, dry basis, on 23 furnaces in Units 22, 23 and 33; 30 TAC §111.111(a)(4)(A)(ii), and THSC, §382.085(b), failing to record daily flare observations on July 21 and 22, 2005; 30 TAC §106.452(2)(A), and THSC, §382.085(b), by failing to prevent abrasive blasting usage from exceeding one ton per day; 30 TAC §106.433(7)(A), and THSC, §382.085(b), by failing to prevent volatile organic compound (VOC) emissions due to painting activities from exceeding six pounds per hour averaged over a five-hour period on July 28 and August 16, 2005; 30 TAC §115.782(b)(1), and THSC, §382.085(b), by failing to repair highly reactive VOC components leaking greater than 10,000 parts per million within a timely manner; 30 TAC §115.781(g)(1) and (2), and THSC, §382.085(b), by failing to record the times and dates on paper logs for leak detection and repair monitoring events; 30 TAC §122.143(4), Air Permit Number O-02151, SC Number 1A, 40 CFR §60.482-7(c)(2) and §61.242-7(c)(2) and THSC, §382.085(b), by failing to monitor 14 leaking valves in Unit 24 from September 1, 2005 to October 20, 2005, after the initial detection of the leak; 30 TAC §122.143(4) and §116.715(a), Air Permit Number O-02151, SC Number 16A, Air Permit Number 22690 and PSD-TX-751M1, SC Number 14F and THSC, §382.085(b), by failing to properly monitor when conducting repairs and maintenance on 13 components site wide; 30 TAC §§115.354(2), 115.356(2), 115.781(a), 115.782(a), 116.715(a) and 122.143(4), Air Permit Number O-02151, SC Numbers 1A and 16A, Air Permit Number 22690 and PSD-TX-751M1, SC Number 14F, 40 CFR §60.482-7(a) and THSC, §382.085(b), by failing to monitor 488 site wide components on a quarterly basis from November 29, 2004 to December 5, 2005; 30 TAC §101.20(2), 40 CFR §61.346(a)(3) and (b)(1) and THSC, §382.085(b), by failing to maintain and repair seals; 30 TAC §122.143(4), Air Permit Number O-02151, SC Number 3(C)(iii) and THSC, §382.085(b), by failing to demonstrate that quarterly visible emissions observations of stationary vents, buildings, and other structures were conducted site wide during May 29, 2005 and June 29, 2005; 30 TAC §115.782(c)(2)(A)(i) and THSC, §382.085(b), by failing to conduct extraordinary repair effort within 14 days on a valve placed on delay of repair; 30 TAC §122.143(4), Air Permit Number O-02151, SC Number 1A, 40 CFR §60.482-7(c) and (h)(2) and THSC, §382.085(b), by failing to monitor valves which were over the 3% allowable on a quarterly basis in Unit 33, 30 TAC §116.715(a) and §122.143(4), Air Permit Number O-02151, SC Number 16A, Air Permit Number 22690 and PSD-TX-751M1, SC Number 23 and THSC, §382.085(b), by failing to monitor cooling tower VOC concentrations; 30 TAC §111.111(a)(4) and §122.143(4), Air Permit Number O-02151, SC Number 1A and THSC, §382.085(b), by failing to prevent visible emissions from the flare (emission point number (EPN) 56-61-10) from exceeding five minutes in a two-hour period on June 4, 2005; 30 TAC §111.143(4), Air Permit Number O-02151, SC Number 26, Alternate Means of Control Permit Authorization Number 2003-01, SC Numbers 5 and 13, and THSC, §382.085(b), by failing to

ensure that the steam flow is within permitted limits and that prompt corrective action was taken when the alarm was activated in Unit 24 on November 20, 2005 and also by failing to continuously supply steam to a wedge plug valve at or greater than 80 pounds per square inch gauge for one furnace EPN 24-36-9 in Unit 24 during the time period November 29, 2004 until May 19, 2005; 30 TAC §§115.352(4), 115.783(5), 116.715(a) and 122.143(4), Air Permit Number 22690 and PSD-TX-751M1, SC Number 3B and 14E, 40 CFR §60.482-6(a)(1) and §63.167(a)(1) and THSC, §382.085(b), 30 TAC §§116.110(a)(4), 117.219(f)(10) and 122.143(4), Air Permit Number O-02151, SC Number 17, and THSC, §382.085(b), by failing to seal open-ended lines in VOC service; by failing to obtain preconstruction authorization and keep records for two portable diesel engines; 30 TAC §116.110(a)(4) and §122.143(4), Air Permit Number O-02151, SC Number 17 and THSC, §382.085(b), by failing to obtain authorization for abrasive blasting and painting activities being conducted at the site; 30 TAC §101.20(2), 40 CFR §61.356(g) and THSC, §382.085(b), by failing to record the quarterly junction box inspections; 30 TAC §115.216(3)(A)(i) and (iii) and THSC, §382.085(b), by failing to record the tank truck identification and leak test date during an unloading operation of a truck on November 20, 2004; 30 TAC §111.143(4), Air Permit Number O-02151, SC Number 26, Alternate Methods of Control Permit Authorization Number 2003-01, SC Numbers 7 and 9, and THSC, §382.085(b), by failing to record the steam flow in Unit 24 from June 3, 2005 to June 16, 2005 and also by failing to record the steam pressure and steam flow rate for seven furnaces (EPNs 24-36-1, 24-36-2, 24-36-3, 24-36-4, 24-36-5, 24-36-6, 24-36-9) in Unit 24 from December 7, 2004 to January 31, 2005; 30 TAC §101.222 and §116.715(a), Air Permit Number 22690 and PSD-TX-751M1, SC Number 1, and THSC, §382.085(b), by failing to prevent unauthorized emissions, by failing to prevent plugging in drum D-9, resulting in an emissions event that occurred on October 20, 2006, and lasted for one hour twenty minutes (Incident Number 82875), and by failing to meet the demonstrations for an affirmative defense; and 30 TAC §101.222 and §116.715(a), Air Permit Number 22690 and PSD-TX-751M1, SC Number 1, and THSC, §382.085(b), by failing to prevent unauthorized emissions, by failing to properly maintain Ethylene Unit 22, resulting in an emissions event that occurred on October 12, 2006, and lasted for 48 hours (Incident 82608), and by failing to meet the demonstrations for an affirmative defense; PENALTY: $168,416; SEP offset amount of $84,208 applied to Houston-Galveston Area Emission Reduction Credit Organization Clean Cities/Clean Vehicles Program; STAFF ATTORNEY: Laurencia Fasoyiro, Litigation Division, MC R-12, (713) 422-8914; REGIONAL OFFICE: Houston Regional Office, 5425 Polk Street, Suite H, Houston, Texas 77023, (713) 767-3500.

(5) COMPANY: Evelio Morales dba Casino Grocery and dba Casino Grocery 2; DOCKET NUMBER: 2005-0547-PST-E; TCEQ ID NUMBERS: RN102243151 and RN104469515; LOCATION: Farm-to-Market Roads 1021 and 2030, Eagle Pass, Maverick County, Texas (Casino Grocery) and 2224 Del Rio Boulevard, Eagle Pass, Maverick County, Texas (Casino Grocery 2); TYPE OF FACILITY: two convenience stores with retail sales of gasoline known as Casino Grocery and Casino Grocery 2; RULES VIOLATED: 30 TAC §334.50(a)(1)(A) and TWC, §26.3475(a) and (c)(1), by failing to provide a proper release detection method capable of detecting a release from any portion of the UST system at the Casino Facility and the Casino 2 Facility; 30 TAC §334.8(c)(4)(A)(vii) and (5)(B)(ii), by failing to timely renew the delivery certificate by submitting a properly completed UST registration and self certification form at least 30 days before the expiration date of the delivery certificate at the Casino Facility and the Casino 2 Facility; 30 TAC §334.8(c)(5)(A)(i) and TWC, §26.3467(a), by failing to make available to a common carrier a valid, current TCEQ delivery certificate before accepting delivery of a regulated substance into USTs at the Casino Facility and the Casino 2 Facility; 30 TAC §334.54(d)(2), by failing to empty temporarily out of service USTs to less than 2.5 centimeters (one inch) of product at the deepest point at the Casino 2 Facility; 30 TAC §334.49(e), by failing to provide records of required corrosion protection tests, including tests of the cathodic protection system conducted at least every 60 days and tests of the system conducted at least once every three years at the Casino 2 Facility; 30 TAC §37.815(a) and (b), by failing to demonstrate financial assurance for taking corrective action and for compensating third parties for bodily injury and property damage caused by accidental releases arising from the operation of petroleum USTs at the Casino 2 Facility; and 30 TAC §334.8(c)(5)(C), by failing to label the fill pipes according to the registration and self-certification form at the Casino 2 Facility; PENALTY: $61,690; STAFF ATTORNEY: Xavier Guerra, Litigation Division, MC R-13, (210) 403-4016; REGIONAL OFFICE: Laredo Regional Office, 707 East Calton Road, Suite 304, Laredo, Texas 78041-3887, (956) 791-6611.

(6) COMPANY: M-Co Auto Supply, Inc. dba M-Co Auto Parts; DOCKET NUMBER: 2008-0072-PST-E; TCEQ ID NUMBER: RN101739282; LOCATION: 2423 Palo Alto Road, San Antonio, Bexar County, Texas; TYPE OF FACILITY: auto parts store with retail sales of gasoline; RULES VIOLATED: 30 TAC §334.8(c)(4)(A)(vii) and (5)(B)(ii), by failing to timely renew a previously issued UST delivery certificate by submitting a properly completed UST registration and self certification form at least 30 days before the expiration date; 30 TAC §334.8(c)(5)(A)(i) and TWC, §26.3467(a), by failing to make available to a common carrier a valid, current TCEQ delivery certificate before accepting delivery of a regulated substance into the USTs; 30 TAC §334.10(b), by failing to maintain UST records and make them immediately available for inspection upon request by agency personnel; 30 TAC §334.50(b)(1)(A) and TWC, §26.3475(c)(1), by failing to monitor USTs for releases at a frequency of at least once every month (not to exceed 35 days between each monitoring); and 30 TAC §334.50(b)(2)(B) and TWC, §26.3475(a), by failing to provide release detection for the piping associated with the USTs; PENALTY: $6,096; STAFF ATTORNEY: Patrick Jackson, Litigation Division, MC 175, (512) 239-6501; REGIONAL OFFICE: San Antonio Regional Office, 14250 Judson Road, San Antonio, Texas 78233-4480, (210) 490-3096.

(7) COMPANY: Town of Mustang; DOCKET NUMBER: 2007-0407-MWD-E; TCEQ ID NUMBER: RN102807864; LOCATION: approximately 800 feet east of Interstate Highway 45 on Farm-to-Market Road 739, Navarro County, Texas; TYPE OF FACILITY: wastewater treatment facility; RULES VIOLATED: 30 TAC §305.125(17) and Texas Pollutant Discharge Elimination System (TPDES) Permit Number WQ0011516001, Sludge Provisions, by failing to submit annual sludge reports for the reporting periods ending July 31, 2005 and July 31, 2006; 30 TAC §305.125(1) and TPDES Permit Number WQ0011516001, Monitoring and Reporting Requirements, Number 5, by failing to have a flow measuring device properly installed, operated, and maintained; 30 TAC §305.125(1), TWC, §26.121(a) and TPDES Permit Number WQ0011516001, Effluent Limitations and Monitoring Requirements, Number 1 and 2, by failing to comply with permit effluent limits for biochemical oxygen demand (five-Day), total suspended solids, flow, and chlorine residual; 30 TAC §305.125(1) and TPDES Permit Number WQ0011516001, Monitoring and Reporting Requirements, Number 7, by failing to provide non-compliance notification as required; 30 TAC §30.331(b) and §30.350(d), by failing to ensure an adequately licensed individual to operate the facility; 30 TAC §305.125(4) and (5) and TWC, §26.121, by failing to prevent unauthorized discharges; and 30 TAC §305.125(9), by failing to notify the TCEQ of the unauthorized discharges; PENALTY: $20,000; STAFF ATTORNEY: Gary Shiu, Litigation Division, MC R-12, (713) 422-8916; REGIONAL OFFICE:

Dallas-Fort Worth Regional Office, 2309 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(8) COMPANY: Trash Solutions L.L.C. dba Wasted; DOCKET NUMBER: 2008-0313-MSW-E; TCEQ ID NUMBER: RN100569607; LOCATION: 7301 Burleson Road, Austin, Travis County, Texas; TYPE OF FACILITY: municipal solid waste transfer station; RULES VIOLATED: 30 TAC §330.7(a), by failing to store and process municipal solid waste in an authorized manner; PENALTY: $1,070; STAFF ATTORNEY: Ben Thompson, Litigation Division, MC 175, (512) 239-1297; REGIONAL OFFICE: Austin Regional Office, 2800 South Interstate Highway 35, Suite 100, Austin, Texas 78704-5712, (512) 339-2929.

TRD-200804711
Kathleen C. Decker
Director, Litigation Division
Texas Commission on Environmental Quality
Filed: September 2, 2008

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Notice of Opportunity to Comment on Default Orders of Administrative Enforcement Actions

The Texas Commission on Environmental Quality (TCEQ or commission) staff is providing an opportunity for written public comment on the listed Default Orders (DOs). The commission staff proposes a DO when the staff has sent an executive director's preliminary report and petition (EDPRP) to an entity outlining the alleged violations; the proposed penalty; and the proposed technical requirements necessary to bring the entity back into compliance; and the entity fails to request a hearing on the matter within 20 days of its receipt of the EDPRP or requests a hearing and fails to participate at the hearing. Similar to the procedure followed with respect to Agreed Orders entered into by the executive director of the commission, in accordance with Texas Water Code (TWC), §7.075 this notice of the proposed order and the opportunity to comment is published in the *Texas Register* no later than the 30th day before the date on which the public comment period closes, which in this case is **October 13, 2008**. The commission will consider any written comments received and the commission may withdraw or withhold approval of a DO if a comment discloses facts or considerations that indicate that consent to the proposed DO is inappropriate, improper, inadequate, or inconsistent with the requirements of the statutes and rules within the commission's jurisdiction, or the commission's orders and permits issued in accordance with the commission's regulatory authority. Additional notice of changes to a proposed DO is not required to be published if those changes are made in response to written comments.

A copy of each proposed DO is available for public inspection at both the commission's central office, located at 12100 Park 35 Circle, Building A, 3rd Floor, Austin, Texas 78753, (512) 239-3400 and at the applicable regional office listed as follows. Written comments about the DO should be sent to the attorney designated for the DO at the commission's central office at P.O. Box 13087, MC 175, Austin, Texas 78711-3087 and must be **received by 5:00 p.m. on October 13, 2008**. Comments may also be sent by facsimile machine to the attorney at (512) 239-3434. The commission's attorneys are available to discuss the DOs and/or the comment procedure at the listed phone numbers; however, §7.075 provides that comments on the DOs shall be submitted to the commission in **writing**.

(1) COMPANY: Arnoldo Perez dba Perez Fuel Stop; DOCKET NUMBER: 2005-1601-PST-E; TCEQ ID NUMBER: RN101445310; LOCATION: 1.75 miles west of United States Highway 83, Mission, Hidalgo County, Texas; TYPE OF FACILITY: convenience store with retail sales of gasoline; RULES VIOLATED: 30 TAC §37.815(a) and (b), by failing to demonstrate acceptable financial assurance for taking corrective action and for compensating third parties for bodily injury and property damage caused by accidental releases from the operation of petroleum underground storage tanks (USTs); and 30 TAC §334.22(a) and TWC, §5.702, by failing to pay UST late fees associated with Financial Administration Account Number 0057827U; PENALTY: $3,150; STAFF ATTORNEY: Dinniah M. Chahin, Litigation Division, MC 175, (512) 239-0617; REGIONAL OFFICE: Harlingen Regional Office, 1804 West Jefferson Avenue, Harlingen, Texas 78550-5247, (956) 425-6010.

(2) COMPANY: Cowcatchers, L.L.C.; DOCKET NUMBER: 2007-1578-PWS-E; TCEQ ID NUMBER: RN104633995; LOCATION: 1100 Bulverde Road, Bulverde, Comal County, Texas; TYPE OF FACILITY: restaurant with a public water supply system; RULES VIOLATED: 30 TAC §290.109(c)(2)(A)(i) and §290.122(c)(2)(B) and Texas Health and Safety Code (THSC), §341.033(d), by failing to collect and submit routine monthly water samples for bacteriological analysis and by failing to provide public notice of the failure to sample during the months of September 2006 - May 2007; PENALTY: $3,757; STAFF ATTORNEY: Rudy Calderon, Litigation Division, MC 175, (512) 239-0205; REGIONAL OFFICE: San Angelo Regional Office, 622 South Oakes, Suite K, San Angelo, Texas 76903-7013, (915) 655-9479.

(3) COMPANY: Frank Lamas dba Lamas Surplus; DOCKET NUMBER: 2007-1212-WQ-E; TCEQ ID NUMBER: RN104917901; LOCATION: 345 East Wheeler Street, Aransas Pass, San Patricio County, Texas; TYPE OF FACILITY: towing and scrap and waste recycling facility; RULES VIOLATED: 30 TAC §281.25(a)(4) and 40 Code of Federal Regulations (CFR) §122.26(c), by failing to obtain authorization to discharge storm water associated with industrial activity to water in the state through an individual permit or a Texas Pollutant Discharge Elimination System (TPDES) Multi-Sector General Permit for storm water; PENALTY: $4,200; STAFF ATTORNEY: Rudy Calderon, Litigation Division, MC 175, (512) 239-0205; REGIONAL OFFICE: Corpus Christi Regional Office, 6300 Ocean Drive, Suite 1200, Corpus Christi, Texas 78412-5839, (361) 825-3100.

(4) COMPANY: James W. Hackney; DOCKET NUMBER: 2007-1273-LII-E; TCEQ ID NUMBER: RN105239826; LOCATION: 19719 Mesquite Branch Court, Spring, Harris County, Texas; TYPE OF FACILITY: landscape irrigation business; RULES VIOLATED: 30 TAC §30.5(a) and (b) and §344.4(a), TWC, §37.003, and Texas Occupations Code, §1903.251, by failing to hold an irrigator license prior to selling, designing, consulting, installing, maintaining, altering, repairing, advertising, or servicing an irrigation system and representing to the public that he could perform a service for which a license is required; PENALTY: $625; STAFF ATTORNEY: Rudy Calderon, Litigation Division, MC 175, (512) 239-0205; REGIONAL OFFICE: Houston Regional Office, 5425 Polk Street, Suite H, Houston, Texas 77023, (713) 767-3500.

(5) COMPANY: N T & M, Inc. dba Fine Cleaners; DOCKET NUMBER: 2006-1334-DCL-E; TCEQ ID NUMBER: RN104161476; LOCATION: 11111 West Little York Road, Houston, Harris County, Texas; TYPE OF FACILITY: dry cleaning facility; RULES VIOLATED: 30 TAC §337.10(a) and THSC, §374.102, by failing to complete and submit the required registration form to the TCEQ for a dry cleaning and/or drop station facility; PENALTY: $1,185; STAFF ATTORNEY: Dinniah M. Chahin, Litigation Division, MC 175, (512) 239-0617; REGIONAL OFFICE: Houston Regional Office, 5425 Polk Street, Suite H, Houston, Texas 77023, (713) 767-3500.

(6) COMPANY: Richard Ayala dba All State Auto & Truck Parts Corpus Christi; DOCKET NUMBER: 2007-1656-WQ-E; TCEQ

ID NUMBER: RN104982251; LOCATION: 3310 Agnes Street, Corpus Christi, Nueces, Texas; TYPE OF FACILITY: automobile salvage yard; RULES VIOLATED: 30 TAC §281.25(a)(4) and 40 CFR §122.26(c), by failing to obtain authorization to discharge storm water associated with industrial activity to water in the state through the Multi-Sector general Permit or an individual permit; PENALTY: $1,050; STAFF ATTORNEY: Patrick Jackson, Litigation Division, MC 175, (512) 239-6501; REGIONAL OFFICE: Corpus Christi Regional Office, 6300 Ocean Drive, Suite 1200, Corpus Christi, Texas 78412-5839, (361) 825-3100.

(7) COMPANY: Victor C. Lopez; DOCKET NUMBER: 2007-1223-MSW-E; TCEQ ID NUMBER: RN105225718; LOCATION: 6607 Farm-to-Market Road 1346 in San Antonio, Bexar County, Texas; TYPE OF FACILITY: property; RULES VIOLATED: 30 TAC §330.15(c), by failing to prevent the unauthorized disposal of municipal solid waste at an unauthorized disposal site; PENALTY: $2,000; STAFF ATTORNEY: Rudy Calderon, Litigation Division, MC 175, (512) 239-0205; REGIONAL OFFICE: San Antonio Regional Office, 14250 Judson Road, San Antonio, Texas 78233-4480, (210) 490-3096.

TRD-200804713
Kathleen C. Decker
Director, Litigation Division
Texas Commission on Environmental Quality
Filed: September 2, 2008

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Notice of Receipt of Application for a Municipal Solid Waste Management Facility

Notice of Receipt of Application and Intent to Obtain a New Municipal Solid Waste Permit, Permit No. 2357 SAN ANGELO PRO PUMP INC. (Liquid Waste Dewatering and Compost Facility), 6696 Grape Creek Road, San Angelo, Tom Green County, Texas 76901, has applied to the Texas Commission on Environmental Quality (TCEQ) for a new Type V permit. The applicant is requesting a permit for a new liquid waste dewatering and composting facility. The facility is located at 6696 Grape Creek Road, San Angelo, Tom Green County, Texas. The TCEQ received the application on July 29, 2008. The permit application is available for viewing and copying at the Tom Green County Library, North Angelo Branch, 3001 N. Chadbourne Street, San Angelo, Tom Green County, Texas.

ADDITIONAL NOTICE. TCEQ's Executive Director has determined the application is administratively complete and will conduct a technical review of the application. After technical review of the application is complete, the Executive Director may prepare a draft permit and will issue a preliminary decision on the application. Notice of the Application and Preliminary Decision will be published and mailed to those who are on the county-wide mailing list and to those who are on the mailing list for this application. That notice will contain the deadline for submitting public comments.

PUBLIC COMMENT/PUBLIC MEETING. You may submit public comments or request a public meeting on this application. The purpose of a public meeting is to provide the opportunity to submit comments or to ask questions about the application. TCEQ will hold a public meeting if the Executive Director determines that there is a significant degree of public interest in the application or if requested by a local legislator. A public meeting is not a contested case hearing.

OPPORTUNITY FOR A CONTESTED CASE HEARING. After the deadline for submitting public comments, the Executive Director will consider all timely comments and prepare a response to all relevant and material, or significant public comments. Unless the application is directly referred for a contested case hearing, the response to comments, and the Executive Director's decision on the application, will be mailed to everyone who submitted public comments and to those persons who are on the mailing list for this application. If comments are received, the mailing will also provide instructions for requesting reconsideration of the Executive Director's decision and for requesting a contested case hearing. A person who may be affected by the facility is entitled to request a contested case hearing from the commission. A contested case hearing is a legal proceeding similar to a civil trial in state district court.

TO REQUEST A CONTESTED CASE HEARING, YOU MUST INCLUDE THE FOLLOWING ITEMS IN YOUR REQUEST: your name, address, phone number; applicant's name and permit number; the location and distance of your property/activities relative to the facility; a specific description of how you would be adversely affected by the facility in a way not common to the general public; and, the statement "I/we request a contested case hearing." If the request for contested case hearing is filed on behalf of a group or association, the request must designate the group's representative for receiving future correspondence; identify an individual member of the group who would be adversely affected by the facility or activity; provide the information discussed above regarding the affected member's location and distance from the facility or activity; explain how and why the member would be affected; and explain how the interests the group seeks to protect are relevant to the group's purpose. Following the close of all applicable comment and request periods, the Executive Director will forward the application and any requests for reconsideration or for a contested case hearing to the TCEQ Commissioners for their consideration at a scheduled Commission meeting. The Commission will only grant a contested case hearing on disputed issues of fact that are relevant and material to the Commission's decision on the application. Further, the Commission will only grant a hearing on issues that were raised in timely filed comments that were not subsequently withdrawn.

MAILING LIST. If you submit public comments, a request for a contested case hearing or a reconsideration of the Executive Director's decision, you will be added to the mailing list for this specific application to receive future public notices mailed by the Office of the Chief Clerk. In addition, you may request to be placed on: (1) the permanent mailing list for a specific applicant name and permit number; and/or (2) the mailing list for a specific county. If you wish to be placed on the permanent and/or the county mailing list, clearly specify which list(s) and send your request to TCEQ Office of the Chief Clerk at the address below.

AGENCY CONTACTS AND INFORMATION. All written public comments and requests must be submitted to the Office of the Chief Clerk, MC 105, TCEQ, P.O. Box 13087, Austin, Texas 78711-3087. If you need more information about this permit application or the permitting process, please call TCEQ Office of Public Assistance, Toll Free, at 1-800-687-4040. Si desea información en Español, puede llamar al 1-800-687-4040. General information about TCEQ can be found at our web site at www.tceq.state.tx.us.

Further information may also be obtained from San Angelo Pro-Pump Inc. (Liquid Waste Dewatering and Compost Facility) at the address stated above or by calling Mr. Joe Stubblefield at (325) 651-4719.

TRD-200804743
LaDonna Castañuela
Chief Clerk
Texas Commission on Environmental Quality
Filed: September 3, 2008

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Notice of Water Quality Applications

The following notices were issued during the period of August 21, 2008 through September 2, 2008.

The following require the applicants to publish notice in a newspaper. Public comments, requests for public meetings, or requests for a contested case hearing may be submitted to the Office of the Chief Clerk, Mail Code 105, P.O. Box 13087, Austin, Texas 78711-3087, WITHIN 30 DAYS OF THE DATE OF NEWSPAPER PUBLICATION OF THE NOTICE.

INFORMATION SECTION

CHEVRON PHILLIPS CHEMICAL COMPANY LP which operates Cedar Bayou Chemical Plant, which manufactures commodity petrochemicals and plastics, has applied for a renewal of TPDES Permit No. WQ0001006000, which authorizes the discharge of treated process wastewater, treated domestic wastewater, cooling tower blowdown, demineralizer regenerate, sour water, and storm water at a daily average flow not to exceed 4,000,000 gallons per day via Outfall 001; storm water on an intermittent and flow variable basis via Outfall 002; and storm water, rinse water from rail cars, and cooling tower blowdown on a continuous and flow variable basis via Outfall 003. The facility is located at 9500 Interstate Highway 10 East, in the City of Baytown, Harris County, Texas. The TCEQ Executive Director has reviewed this action for consistency with the Texas Coastal Management Program goals and policies in accordance with the regulations of the Coastal Coordination Council, and has determined that the action is consistent with the applicable CMP goals and policies.

CITY OF CROWELL has applied for a new permit, proposed Texas Pollutant Discharge Elimination System (TPDES) Permit No. WQ0014888001, to authorize the discharge of treated domestic wastewater at a daily average flow not to exceed 200,000 gallons per day. The facility was previously permitted under TPDES Permit No. 10638-001 which expired December 01, 2007. The facility is located approximately 1/2 mile east of AT&SF Railroad crossing over State Highway 6, in the southeast corner of the City of Crowell in Foard County, Texas.

CITY OF HART has applied to the Texas Commission on Environmental Quality (TCEQ) for a renewal of Permit No. WQ0010139001, which authorizes the disposal of treated domestic wastewater at a daily average flow not to exceed 180,000 gallons per day via evaporation with effluent transfer to a playa basin. This permit will not authorize a discharge of pollutants into waters in the State. The wastewater treatment facility and disposal site are located approximately 1.0 mile north of the intersection of State Highway 194 and Farm-to-Market Road 168 and one block west of Farm-to-Market Road 168, north of the City of Hart in Castro County, Texas.

PORT OF HOUSTON AUTHORITY has applied to the Texas Commission on Environmental Quality (TCEQ) for a major amendment to TPDES Permit No. WQ0012375001 to authorize the deletion of Other Requirement, Item No. 11 in the existing permit which required an operator to inspect the plant daily and instead require inspection at least five days per week, the standard for a wastewater treatment facility this size based on plant upgrades and good performance. The current permit authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 22,000 gallons per day. The facility is located at 16203 Peninsula Boulevard, approximately 3,500 feet upstream of the confluence of Carpenters Bayou and the Houston Ship Channel in Harris County, Texas.

WEST ROAD WATER SUPPLY CORPORATION AND MCDONALDS CORPORATION which operates the West Road Wastewater Treatment Plant, has applied for a renewal of TPDES Permit No. WQ0002761000, which authorizes the discharge of treated wastewater from a fast food restaurant and treated domestic wastewater from a fast food restaurant, two churches, and retail outlets at a daily average flow not to exceed 13,000 gallons per day via Outfall 001. The facility is located at 185 West Road, approximately 100 feet south and 100 feet east of the intersection of West Road and Interstate Highway 45, in the community of Aldine, Harris County, Texas.

If you need more information about these permit applications or the permitting process, please call the TCEQ Office of Public Assistance, Toll Free, at 1-800-687-4040. General information about the TCEQ can be found at our web site at www.tceq.state.tx.us. Si desea información en Español, puede llamar al 1-800-687-4040.

TRD-200804742
LaDonna Castañuela
Chief Clerk
Texas Commission on Environmental Quality
Filed: September 3, 2008

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Texas Department of Insurance

Company Licensing

Application to change the name of FOLKSAMERICA REINSURANCE COMPANY to WHITE MOUNTAINS REINSURANCE COMPANY OF AMERICA, a foreign fire and casualty company. The home office is in New York, New York.

Application for incorporation in the State of Texas by AMERIGROUP INSURANCE COMPANY (DBA AMERIGROUP HEALTH PLAN), a domestic life company. The home office is in Houston, Texas.

Application for admission to the State of Texas by CORNHUSKER CASUALTY COMPANY, a foreign fire and/or casualty company. The home office is in Omaha, Nebraska.

Any objections must be filed with the Texas Department of Insurance, within twenty (20) calendar days from the date of the *Texas Register* publication, addressed to the attention of Godwin Ohaechesi, 333 Guadalupe Street, M/C 305-2C, Austin, Texas 78701.

TRD-200804747
Gene C. Jarmon
Chief Clerk and General Counsel
Texas Department of Insurance
Filed: September 3, 2008

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Third Party Administrator Applications

The following third party administrator (TPA) applications have been filed with the Texas Department of Insurance and are under consideration.

Application of SCHALLER ANDERSON OF ARIZONA, L.L.C., a foreign third party administrator. The home office is PHOENIX, ARIZONA.

Application of CREATIVE RISK SOLUTIONS, INC. (using the assumed name of YOURCLAIMS.COM COMPANY), as a foreign third party administrator. The home office is WEST DES MOINES, IOWA.

Any objections must be filed within 20 days after this notice is published in the *Texas Register*, addressed to the attention of David Moskowitz, MC 305-2E, 333 Guadalupe, Austin, Texas 78701.

TRD-200804750

Gene C. Jarmon
Chief Clerk and General Counsel
Texas Department of Insurance
Filed: September 3, 2008

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Texas Lottery Commission

Instant Game Number 1129 "Lucky Duck"

1.0 Name and Style of Game.

A. The name of Instant Game No. 1129 is "LUCKY DUCK". The play style is "key number match with doubler".

1.1 Price of Instant Ticket.

A. Tickets for Instant Game No. 1129 shall be $1.00 per ticket.

1.2 Definitions in Instant Game No. 1129.

A. Display Printing - That area of the instant game ticket outside of the area where the Overprint and Play Symbols appear.

B. Latex Overprint - The removable scratch-off covering over the Play Symbols on the front of the ticket.

C. Play Symbol - The printed data under the latex on the front of the instant ticket that is used to determine eligibility for a prize. Each Play Symbol is printed in Symbol font in black ink in positive except for dual-image games. The possible black play symbols are: 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, DUCK SYMBOL, $1.00, $2.00, $4.00, $5.00, $10.00, $20.00, $40.00, $100 and $1,000.

D. Play Symbol Caption - The printed material appearing below each Play Symbol which explains the Play Symbol. One caption appears under each Play Symbol and is printed in caption font in black ink in positive. The Play Symbol Caption which corresponds with and verifies each Play Symbol is as follows:

Figure 1: GAME NO. 1129 - 1.2D

PLAY SYMBOL	CAPTION
1	ONE
2	TWO
3	THR
4	FOR
5	FIV
6	SIX
7	SVN
8	EGT
9	NIN
10	TEN
11	ELV
12	TLV
DUCK SYMBOL	DBL
$1.00	ONE$
$2.00	TWO$
$4.00	FOUR$
$5.00	FIVE$
$10.00	TEN$
$20.00	TWENTY
$40.00	FORTY
$100	ONE HUND
$1,000	ONE THOU

E. Serial Number - A unique 14 (fourteen) digit number appearing under the latex scratch-off covering on the front of the ticket. There will be a four (4)-digit "security number" which will be individually boxed and randomly placed within the number. The remaining ten (10) digits of the Serial Number are the Validation Number. The Serial Number is positioned beneath the bottom row of play data in the scratched-off play area. The Serial Number is for validation purposes and cannot be used to play the game. The format will be: 00000000000000.

F. Low-Tier Prize - A prize of $1.00, $2.00, $4.00, $5.00, $10.00 or $20.00.

G. Mid-Tier Prize - A prize of $40.00 or $100.

H. High-Tier Prize - A prize of $1,000.

I. Bar Code - A 24 (twenty-four) character interleaved two (2) of five (5) bar code which will include a four (4) digit game ID, the seven

(7) digit pack number, the three (3) digit ticket number and the ten (10) digit Validation Number. The bar code appears on the back of the ticket.

J. Pack-Ticket Number - A 14 (fourteen) digit number consisting of the four (4) digit game number (1129), a seven (7) digit pack number, and a three (3) digit ticket number. Ticket numbers start with 001 and end with 150 within each pack. The format will be: 1129-0000001-001.

K. Pack - A pack of "LUCKY DUCK" Instant Game tickets contains 150 tickets, packed in plastic shrink-wrapping and fanfolded in pages of five (5). Tickets 001 to 005 will be on the top page; tickets 006 to 010 on the next page; etc.; and tickets 146 to 150 will be on the last page with backs exposed. Ticket 001 will be folded over so the front of ticket 001 and 010 will be exposed.

L. Non-Winning Ticket - A ticket which is not programmed to be a winning ticket or a ticket that does not meet all of the requirements of these Game Procedures, the State Lottery Act (Texas Government Code, Chapter 466), and applicable rules adopted by the Texas Lottery pursuant to the State Lottery Act and referenced in 16 TAC, Chapter 401.

M. Ticket or Instant Game Ticket, or Instant Ticket - A Texas Lottery "LUCKY DUCK" Instant Game No. 1129 ticket.

2.0 Determination of Prize Winners. The determination of prize winners is subject to the general ticket validation requirements set forth in Texas Lottery Rule 401.302, Instant Game Rules, these Game Procedures, and the requirements set out on the back of each instant ticket. A prize winner in the "LUCKY DUCK" Instant Game is determined once the latex on the ticket is scratched off to expose 11 (eleven) Play Symbols. If a player matches any of YOUR NUMBERS play symbols to the LUCKY NUMBER play symbol, the player wins the PRIZE shown for that number. If a player reveals a "DUCK" play symbol, the player wins DOUBLE the PRIZE shown for that symbol. No portion of the display printing nor any extraneous matter whatsoever shall be usable or playable as a part of the Instant Game.

2.1 Instant Ticket Validation Requirements.

A. To be a valid Instant Game ticket, all of the following requirements must be met:

1. Exactly 11 (eleven) Play Symbols must appear under the latex overprint on the front portion of the ticket;

2. Each of the Play Symbols must have a Play Symbol Caption underneath, unless specified, and each Play Symbol must agree with its Play Symbol Caption;

3. Each of the Play Symbols must be present in its entirety and be fully legible;

4. Each of the Play Symbols must be printed in black ink except for dual image games;

5. The ticket shall be intact;

6. The Serial Number, Retailer Validation Code and Pack-Ticket Number must be present in their entirety and be fully legible;

7. The Serial Number must correspond, using the Texas Lottery's codes, to the Play Symbols on the ticket;

8. The ticket must not have a hole punched through it, be mutilated, altered, unreadable, reconstituted or tampered with in any manner;

9. The ticket must not be counterfeit in whole or in part;

10. The ticket must have been issued by the Texas Lottery in an authorized manner;

11. The ticket must not have been stolen, nor appear on any list of omitted tickets or non-activated tickets on file at the Texas Lottery;

12. The Play Symbols, Serial Number, Retailer Validation Code and Pack-Ticket Number must be right side up and not reversed in any manner;

13. The ticket must be complete and not miscut, and have exactly 11 (eleven) Play Symbols under the latex overprint on the front portion of the ticket, exactly one Serial Number, exactly one Retailer Validation Code, and exactly one Pack-Ticket Number on the ticket;

14. The Serial Number of an apparent winning ticket shall correspond with the Texas Lottery's Serial Numbers for winning tickets, and a ticket with that Serial Number shall not have been paid previously;

15. The ticket must not be blank or partially blank, misregistered, defective or printed or produced in error;

16. Each of the 11 (eleven) Play Symbols must be exactly one of those described in Section 1.2.C of these Game Procedures;

17. Each of the 11 (eleven) Play Symbols on the ticket must be printed in the Symbol font and must correspond precisely to the artwork on file at the Texas Lottery; the ticket Serial Numbers must be printed in the Serial font and must correspond precisely to the artwork on file at the Texas Lottery; and the Pack-Ticket Number must be printed in the Pack-Ticket Number font and must correspond precisely to the artwork on file at the Texas Lottery;

18. The display printing on the ticket must be regular in every respect and correspond precisely to the artwork on file at the Texas Lottery; and

19. The ticket must have been received by the Texas Lottery by applicable deadlines.

B. The ticket must pass all additional validation tests provided for in these Game Procedures, the Texas Lottery's Rules governing the award of prizes of the amount to be validated, and any confidential validation and security tests of the Texas Lottery.

C. Any Instant Game ticket not passing all of the validation requirements is void and ineligible for any prize and shall not be paid. However, the Executive Director may, solely at the Executive Director's discretion, refund the retail sales price of the ticket. In the event a defective ticket is purchased, the only responsibility or liability of the Texas Lottery shall be to replace the defective ticket with another unplayed ticket in that Instant Game (or a ticket of equivalent sales price from any other current Instant Lottery game) or refund the retail sales price of the ticket, solely at the Executive Director's discretion.

2.2 Programmed Game Parameters.

A. Consecutive non-winning tickets in a pack will not have identical play data, spot for spot.

B. No duplicate non-winning prize symbols on a ticket.

C. No duplicate non-winning YOUR NUMBERS play symbols on a ticket.

D. Non-winning prize symbols will never be the same as the winning prize symbol(s).

E. The top prize will appear on every ticket unless otherwise restricted by the prize structure.

F. No prize amount in a non-winning spot will correspond with the YOUR NUMBERS play symbol (i.e. 5 and $5).

2.3 Procedure for Claiming Prizes.

A. To claim a "LUCKY DUCK" Instant Game prize of $1.00, $2.00, $4.00, $5.00, $10.00, $20.00, $40.00 or $100, a claimant shall sign the back of the ticket in the space designated on the ticket and present the winning ticket to any Texas Lottery Retailer. The Texas Lottery Retailer shall verify the claim and, if valid, and upon presentation of proper identification, if appropriate, make payment of the amount due the claimant and physically void the ticket; provided that the Texas Lottery Retailer may, but is not required, to pay a $40.00 or $100 ticket. In the event the Texas Lottery Retailer cannot verify the claim, the Texas Lottery Retailer shall provide the claimant with a claim form and instruct the claimant on how to file a claim with the Texas Lottery. If the claim is validated by the Texas Lottery, a check shall be forwarded to the claimant in the amount due. In the event the claim is not validated, the claim shall be denied and the claimant shall be notified promptly. A claimant may also claim any of the above prizes under the procedure described in Section 2.3.B and Section 2.3.C of these Game Procedures.

B. To claim a "LUCKY DUCK" Instant Game prize of $1,000 the claimant must sign the winning ticket and present it at one of the Texas Lottery's Claim Centers. If the claim is validated by the Texas Lottery, payment will be made to the bearer of the validated winning ticket for that prize upon presentation of proper identification. When paying a prize of $600 or more, the Texas Lottery shall file the appropriate income reporting form with the Internal Revenue Service (IRS) and shall withhold federal income tax at a rate set by the IRS if required. In the event that the claim is not validated by the Texas Lottery, the claim shall be denied and the claimant shall be notified promptly.

C. As an alternative method of claiming a "LUCKY DUCK" Instant Game prize, the claimant must sign the winning ticket, thoroughly complete a claim form, and mail both to: Texas Lottery Commission, Post Office Box 16600, Austin, Texas 78761-6600. The risk of sending a ticket remains with the claimant. In the event that the claim is not validated by the Texas Lottery, the claim shall be denied and the claimant shall be notified promptly.

D. Prior to payment by the Texas Lottery of any prize, the Texas Lottery shall deduct a sufficient amount from the winnings of a person who has been finally determined to be:

1. delinquent in the payment of a tax or other money collected by the Comptroller, the Texas Workforce Commission, or Texas Alcoholic Beverage Commission;

2. delinquent in making child support payments administered or collected by the Attorney General;

3. delinquent in reimbursing the Texas Health and Human Services Commission for a benefit granted in error under the food stamp program or the program of financial assistance under Chapter 31, Human Resources Code;

4. in default on a loan made under Chapter 52, Education Code; or

5. in default on a loan guaranteed under Chapter 57, Education Code.

E. If a person is indebted or owes delinquent taxes to the State, other than those specified in the preceding paragraph, the winnings of a person shall be withheld until the debt or taxes are paid.

2.4 Allowance for Delay of Payment. The Texas Lottery may delay payment of the prize pending a final determination by the Executive Director, under any of the following circumstances:

A. if a dispute occurs, or it appears likely that a dispute may occur, regarding the prize;

B. if there is any question regarding the identity of the claimant;

C. if there is any question regarding the validity of the ticket presented for payment; or

D. if the claim is subject to any deduction from the payment otherwise due, as described in Section 2.3.D of these Game Procedures. No liability for interest for any delay shall accrue to the benefit of the claimant pending payment of the claim.

2.5 Payment of Prizes to Persons Under 18. If a person under the age of 18 years is entitled to a cash prize of less than $600 from the "LUCKY DUCK" Instant Game, the Texas Lottery shall deliver to an adult member of the minor's family or the minor's guardian a check or warrant in the amount of the prize payable to the order of the minor.

2.6 If a person under the age of 18 years is entitled to a cash prize of more than $600 from the "LUCKY DUCK" Instant Game, the Texas Lottery shall deposit the amount of the prize in a custodial bank account, with an adult member of the minor's family or the minor's guardian serving as custodian for the minor.

2.7 Instant Ticket Claim Period. All Instant Game prizes must be claimed within 180 days following the end of the Instant Game or within the applicable time period for certain eligible military personnel as set forth in Texas Government Code Section 466.408. Any prize not claimed within that period, and in the manner specified in these Game Procedures and on the back of each ticket, shall be forfeited.

2.8 Disclaimer. The number of prizes in a game is approximate based on the number of tickets ordered. The number of actual prizes available in a game may vary based on number of tickets manufactured, testing, distribution, sales and number of prizes claimed. An Instant Game ticket may continue to be sold even when all the top prizes have been claimed.

3.0 Instant Ticket Ownership.

A. Until such time as a signature is placed upon the back portion of an Instant Game ticket in the space designated, a ticket shall be owned by the physical possessor of said ticket. When a signature is placed on the back of the ticket in the space designated, the player whose signature appears in that area shall be the owner of the ticket and shall be entitled to any prize attributable thereto. Notwithstanding any name or names submitted on a claim form, the Executive Director shall make payment to the player whose signature appears on the back of the ticket in the space designated. If more than one name appears on the back of the ticket, the Executive Director will require that one of those players whose name appears thereon be designated by such players to receive payment.

B. The Texas Lottery shall not be responsible for lost or stolen Instant Game tickets and shall not be required to pay on a lost or stolen Instant Game ticket.

4.0 Number and Value of Instant Prizes. There will be approximately 10,080,000 tickets in the Instant Game No. 1129. The approximate number and value of prizes in the game are as follows:

Figure 2: GAME NO. 1129 - 4.0

Prize Amount	Approximate Number of Winners*	Approximate Odds are 1 in**
$1	1,209,600	8.33
$2	705,600	14.29
$4	252,000	40.00
$5	67,200	150.00
$10	67,200	150.00
$20	29,400	342.86
$40	16,380	615.38
$100	840	12,000.00
$1,000	84	120,000.00

*The number of prizes in a game is approximate based on the number of tickets ordered. The number of actual prizes available in a game may vary based on number of tickets manufactured, testing, distribution, sales and number of prizes claimed.

**The overall odds of winning a prize are 1 in 4.29. The individual odds of winning for a particular prize level may vary based on sales, distribution, testing, and number of prizes claimed.

A. The actual number of tickets in the game may be increased or decreased at the sole discretion of the Texas Lottery Commission.

5.0 End of the Instant Game. The Executive Director may, at any time, announce a closing date (end date) for the Instant Game No. 1129 without advance notice, at which point no further tickets in that game may be sold.

6.0 Governing Law. In purchasing an Instant Game ticket, the player agrees to comply with, and abide by, these Game Procedures for Instant Game No. 1129, the State Lottery Act (Texas Government Code, Chapter 466), applicable rules adopted by the Texas Lottery pursuant to the State Lottery Act and referenced in 16 TAC, Chapter 401, and all final decisions of the Executive Director.

TRD-200804705
Kimberly L. Kiplin
General Counsel
Texas Lottery Commission
Filed: September 2, 2008

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Instant Game Number 1132 "Stacks of Cash"

1.0 Name and Style of Game.

A. The name of Instant Game No. 1132 is "STACKS OF CASH". The play style is "key number match with multiplier".

1.1 Price of Instant Ticket.

A. Tickets for Instant Game No. 1132 shall be $10.00 per ticket.

1.2 Definitions in Instant Game No. 1132.

A. Display Printing - That area of the instant game ticket outside of the area where the Overprint and Play Symbols appear.

B. Latex Overprint - The removable scratch-off covering over the Play Symbols on the front of the ticket.

C. Play Symbol - The printed data under the latex on the front of the instant ticket that is used to determine eligibility for a prize. Each Play Symbol is printed in Symbol font in black ink in positive except for dual-image games. The possible black play symbols are: 1, 2, 3, 4, 5, 6, 7, 8, 9, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 10X SYMBOL, $10.00, $20.00, $50.00, $100, $200, $500, $1,000, $2,500 and $100,000.

D. Play Symbol Caption - The printed material appearing below each Play Symbol which explains the Play Symbol. One caption appears under each Play Symbol and is printed in caption font in black ink in positive. The Play Symbol Caption which corresponds with and verifies each Play Symbol is as follows:

Figure 1: GAME NO. 1132 - 1.2D

PLAY SYMBOL	CAPTION
1	ONE
2	TWO
3	THR
4	FOR
5	FIV
6	SIX
7	SVN
8	EGT
9	NIN
11	ELV
12	TLV
13	TRN
14	FTN
15	FFN
16	SXN
17	SVT
18	ETN
19	NTN
20	TWY
21	TWON
22	TWTO
23	TWTH
24	TWFR
25	TWFV
26	TWSX
27	TWSV
28	TWET
29	TWNI
30	TRTY
31	TRON
32	TRTO
33	TRTH
34	TRFR
35	TRFV
36	TRSX
37	TRSV
38	TRET
39	TRNI
40	FRTY
10X SYMBOL	WINX10
$10.00	TEN$
$20.00	TWENTY
$50.00	FIFTY
$100	ONE HUND
$200	TWO HUND
$500	FIV HUND

$1,000	ONE THOU
$2,500	25 HUND
$100,000	HUN THOU

E. Serial Number - A unique 14 (fourteen) digit number appearing under the latex scratch-off covering on the front of the ticket. There will be a four (4)-digit "security number" which will be individually boxed and randomly placed within the number. The remaining ten (10) digits of the Serial Number are the Validation Number. The Serial Number is positioned beneath the bottom row of play data in the scratched-off play area. The Serial Number is for validation purposes and cannot be used to play the game. The format will be: 00000000000000.

F. Low-Tier Prize - A prize of $10.00 or $20.00.

G. Mid-Tier Prize - A prize of $50.00, $100, $200 or $500.

H. High-Tier Prize - A prize of $1,000, $2,500 or $100,000.

I. Bar Code - A 24 (twenty-four) character interleaved two (2) of five (5) bar code which will include a four (4) digit game ID, the seven (7) digit pack number, the three (3) digit ticket number and the ten (10) digit Validation Number. The bar code appears on the back of the ticket.

J. Pack-Ticket Number - A 14 (fourteen) digit number consisting of the four (4) digit game number (1132), a seven (7) digit pack number, and a three (3) digit ticket number. Ticket numbers start with 001 and end with 050 within each pack. The format will be: 1132-0000001-001.

K. Pack - A pack of "STACKS OF CASH" Instant Game tickets contains 050 tickets, packed in plastic shrink-wrapping and fanfolded in pages of one (1). Ticket back 001 and 050 will both be exposed.

L. Non-Winning Ticket - A ticket which is not programmed to be a winning ticket or a ticket that does not meet all of the requirements of these Game Procedures, the State Lottery Act (Texas Government Code, Chapter 466), and applicable rules adopted by the Texas Lottery pursuant to the State Lottery Act and referenced in 16 TAC, Chapter 401.

M. Ticket or Instant Game Ticket, or Instant Ticket - A Texas Lottery "STACKS OF CASH" Instant Game No. 1132 ticket.

2.0 Determination of Prize Winners. The determination of prize winners is subject to the general ticket validation requirements set forth in Texas Lottery Rule 401.302, Instant Game Rules, these Game Procedures, and the requirements set out on the back of each instant ticket. A prize winner in the "STACKS OF CASH" Instant Game is determined once the latex on the ticket is scratched off to expose 45 (forty-five) Play Symbols. If a player matches any of YOUR NUMBERS play symbols to any of the WINNING NUMBERS play symbols, the player wins PRIZE shown for that number. If a player reveals a "10X" play symbol, the player wins 10 TIMES the PRIZE shown for that symbol. No portion of the display printing nor any extraneous matter whatsoever shall be usable or playable as a part of the Instant Game.

2.1 Instant Ticket Validation Requirements.

A. To be a valid Instant Game ticket, all of the following requirements must be met:

1. Exactly 45 (forty-five) Play Symbols must appear under the latex overprint on the front portion of the ticket;

2. Each of the Play Symbols must have a Play Symbol Caption underneath, unless specified, and each Play Symbol must agree with its Play Symbol Caption;

3. Each of the Play Symbols must be present in its entirety and be fully legible;

4. Each of the Play Symbols must be printed in black ink except for dual image games;

5. The ticket shall be intact;

6. The Serial Number, Retailer Validation Code and Pack-Ticket Number must be present in their entirety and be fully legible;

7. The Serial Number must correspond, using the Texas Lottery's codes, to the Play Symbols on the ticket;

8. The ticket must not have a hole punched through it, be mutilated, altered, unreadable, reconstituted or tampered with in any manner;

9. The ticket must not be counterfeit in whole or in part;

10. The ticket must have been issued by the Texas Lottery in an authorized manner;

11. The ticket must not have been stolen, nor appear on any list of omitted tickets or non-activated tickets on file at the Texas Lottery;

12. The Play Symbols, Serial Number, Retailer Validation Code and Pack-Ticket Number must be right side up and not reversed in any manner;

13. The ticket must be complete and not miscut, and have exactly 45 (forty-five) Play Symbols under the latex overprint on the front portion of the ticket, exactly one Serial Number, exactly one Retailer Validation Code, and exactly one Pack-Ticket Number on the ticket;

14. The Serial Number of an apparent winning ticket shall correspond with the Texas Lottery's Serial Numbers for winning tickets, and a ticket with that Serial Number shall not have been paid previously;

15. The ticket must not be blank or partially blank, misregistered, defective or printed or produced in error;

16. Each of the 45 (forty-five) Play Symbols must be exactly one of those described in Section 1.2.C of these Game Procedures;

17. Each of the 45 (forty-five) Play Symbols on the ticket must be printed in the Symbol font and must correspond precisely to the artwork on file at the Texas Lottery; the ticket Serial Numbers must be printed in the Serial font and must correspond precisely to the artwork on file at the Texas Lottery; and the Pack-Ticket Number must be printed in the Pack-Ticket Number font and must correspond precisely to the artwork on file at the Texas Lottery;

18. The display printing on the ticket must be regular in every respect and correspond precisely to the artwork on file at the Texas Lottery; and

19. The ticket must have been received by the Texas Lottery by applicable deadlines.

B. The ticket must pass all additional validation tests provided for in these Game Procedures, the Texas Lottery's Rules governing the award

of prizes of the amount to be validated, and any confidential validation and security tests of the Texas Lottery.

C. Any Instant Game ticket not passing all of the validation requirements is void and ineligible for any prize and shall not be paid. However, the Executive Director may, solely at the Executive Director's discretion, refund the retail sales price of the ticket. In the event a defective ticket is purchased, the only responsibility or liability of the Texas Lottery shall be to replace the defective ticket with another unplayed ticket in that Instant Game (or a ticket of equivalent sales price from any other current Instant Lottery game) or refund the retail sales price of the ticket, solely at the Executive Director's discretion.

2.2 Programmed Game Parameters.

A. Consecutive non-winning tickets in a pack will not have identical play data, spot for spot.

B. No duplicate non-winning YOUR NUMBERS play symbols on a ticket.

C. No duplicate WINNING NUMBERS play symbols on a ticket.

D. No prize amount in a non-winning spot will correspond with the YOUR NUMBER play symbol (i.e. 20 and $20).

E. No more than 3 matching non-winning prize symbols on a ticket.

F. Non-winning prize symbols will not match winning prize symbols on a ticket.

G. The "10X" (win x 10) play symbol will only appear on winning tickets as dictated by the prize structure.

H. The top prize will appear on every ticket unless otherwise restricted.

2.3 Procedure for Claiming Prizes.

A. To claim a "STACKS OF CASH" Instant Game prize of $10.00, $20.00, $50.00, $100, $200 or $500, a claimant shall sign the back of the ticket in the space designated on the ticket and present the winning ticket to any Texas Lottery Retailer. The Texas Lottery Retailer shall verify the claim and, if valid, and upon presentation of proper identification, if appropriate, make payment of the amount due the claimant and physically void the ticket; provided that the Texas Lottery Retailer may, but is not required, to pay a $50.00, $100, $200 or $500 ticket. In the event the Texas Lottery Retailer cannot verify the claim, the Texas Lottery Retailer shall provide the claimant with a claim form and instruct the claimant on how to file a claim with the Texas Lottery. If the claim is validated by the Texas Lottery, a check shall be forwarded to the claimant in the amount due. In the event the claim is not validated, the claim shall be denied and the claimant shall be notified promptly. A claimant may also claim any of the above prizes under the procedure described in Section 2.3.B and Section 2.3.C of these Game Procedures.

B. To claim a "STACKS OF CASH" Instant Game prize of $1,000, $2,500 or $100,000, the claimant must sign the winning ticket and present it at one of the Texas Lottery's Claim Centers. If the claim is validated by the Texas Lottery, payment will be made to the bearer of the validated winning ticket for that prize upon presentation of proper identification. When paying a prize of $600 or more, the Texas Lottery shall file the appropriate income reporting form with the Internal Revenue Service (IRS) and shall withhold federal income tax at a rate set by the IRS if required. In the event that the claim is not validated by the Texas Lottery, the claim shall be denied and the claimant shall be notified promptly.

C. As an alternative method of claiming a "STACKS OF CASH" Instant Game prize, the claimant must sign the winning ticket, thoroughly complete a claim form, and mail both to: Texas Lottery Commission, Post Office Box 16600, Austin, Texas 78761-6600. The risk of sending a ticket remains with the claimant. In the event that the claim is not validated by the Texas Lottery, the claim shall be denied and the claimant shall be notified promptly.

D. Prior to payment by the Texas Lottery of any prize, the Texas Lottery shall deduct a sufficient amount from the winnings of a person who has been finally determined to be:

1. delinquent in the payment of a tax or other money collected by the Comptroller, the Texas Workforce Commission, or Texas Alcoholic Beverage Commission;

2. delinquent in making child support payments administered or collected by the Attorney General;

3. delinquent in reimbursing the Texas Health and Human Services Commission for a benefit granted in error under the food stamp program or the program of financial assistance under Chapter 31, Human Resources Code;

4. in default on a loan made under Chapter 52, Education Code; or

5. in default on a loan guaranteed under Chapter 57, Education Code.

E. If a person is indebted or owes delinquent taxes to the State, other than those specified in the preceding paragraph, the winnings of a person shall be withheld until the debt or taxes are paid.

2.4 Allowance for Delay of Payment. The Texas Lottery may delay payment of the prize pending a final determination by the Executive Director, under any of the following circumstances:

A. if a dispute occurs, or it appears likely that a dispute may occur, regarding the prize;

B. if there is any question regarding the identity of the claimant;

C. if there is any question regarding the validity of the ticket presented for payment; or

D. if the claim is subject to any deduction from the payment otherwise due, as described in Section 2.3.D of these Game Procedures. No liability for interest for any delay shall accrue to the benefit of the claimant pending payment of the claim.

2.5 Payment of Prizes to Persons Under 18. If a person under the age of 18 years is entitled to a cash prize of less than $600 from the "STACKS OF CASH" Instant Game, the Texas Lottery shall deliver to an adult member of the minor's family or the minor's guardian a check or warrant in the amount of the prize payable to the order of the minor.

2.6 If a person under the age of 18 years is entitled to a cash prize of more than $600 from the "STACKS OF CASH" Instant Game, the Texas Lottery shall deposit the amount of the prize in a custodial bank account, with an adult member of the minor's family or the minor's guardian serving as custodian for the minor.

2.7 Instant Ticket Claim Period. All Instant Game prizes must be claimed within 180 days following the end of the Instant Game or within the applicable time period for certain eligible military personnel as set forth in Texas Government Code Section 466.408. Any prize not claimed within that period, and in the manner specified in these Game Procedures and on the back of each ticket, shall be forfeited.

2.8 Disclaimer. The number of prizes in a game is approximate based on the number of tickets ordered. The number of actual prizes available in a game may vary based on number of tickets manufactured, testing, distribution, sales and number of prizes claimed. An Instant Game ticket may continue to be sold even when all the top prizes have been claimed.

3.0 Instant Ticket Ownership.

A. Until such time as a signature is placed upon the back portion of an Instant Game ticket in the space designated, a ticket shall be owned by the physical possessor of said ticket. When a signature is placed on the back of the ticket in the space designated, the player whose signature appears in that area shall be the owner of the ticket and shall be entitled to any prize attributable thereto. Notwithstanding any name or names submitted on a claim form, the Executive Director shall make payment to the player whose signature appears on the back of the ticket in the space designated. If more than one name appears on the back of the ticket, the Executive Director will require that one of those players whose name appears thereon be designated by such players to receive payment.

B. The Texas Lottery shall not be responsible for lost or stolen Instant Game tickets and shall not be required to pay on a lost or stolen Instant Game ticket.

4.0 Number and Value of Instant Prizes. There will be approximately 4,080,000 tickets in the Instant Game No. 1132. The approximate number and value of prizes in the game are as follows:

Figure 2: GAME NO. 1132 - 4.0

Prize Amount	Approximate Number of Winners*	Approximate Odds are 1 in**
$10	326,400	12.50
$20	612,200	6.67
$50	81,600	50.00
$100	58,310	69.97
$200	8,840	461.54
$500	1,337	3,051.61
$1,000	139	29,352.52
$2,500	68	60,000.00
$100,000	4	1,020,000.00

*The number of prizes in a game is approximate based on the number of tickets ordered. The number of actual prizes available in a game may vary based on number of tickets manufactured, testing, distribution, sales and number of prizes claimed.

**The overall odds of winning a prize are 1 in 3.75. The individual odds of winning for a particular prize level may vary based on sales, distribution, testing, and number of prizes claimed.

A. The actual number of tickets in the game may be increased or decreased at the sole discretion of the Texas Lottery Commission.

5.0 End of the Instant Game. The Executive Director may, at any time, announce a closing date (end date) for the Instant Game No. 1132 without advance notice, at which point no further tickets in that game may be sold.

6.0 Governing Law. In purchasing an Instant Game ticket, the player agrees to comply with, and abide by, these Game Procedures for Instant Game No. 1132, the State Lottery Act (Texas Government Code, Chapter 466), applicable rules adopted by the Texas Lottery pursuant to the State Lottery Act and referenced in 16 TAC, Chapter 401, and all final decisions of the Executive Director.

TRD-200804706
Kimberly L. Kiplin
General Counsel
Texas Lottery Commission
Filed: September 2, 2008

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Instant Game Number 1133 "Lucky Slots"

1.0 Name and Style of Game.

A. The name of Instant Game No. 1133 is "LUCKY SLOTS". The play style is "slots-straight line".

1.1 Price of Instant Ticket.

A. Tickets for Instant Game No. 1133 shall be $1.00 per ticket.

1.2 Definitions in Instant Game No. 1133.

A. Display Printing - That area of the instant game ticket outside of the area where the Overprint and Play Symbols appear.

B. Latex Overprint - The removable scratch-off covering over the Play Symbols on the front of the ticket.

C. Play Symbol - The printed data under the latex on the front of the instant ticket that is used to determine eligibility for a prize. Each Play Symbol is printed in Symbol font in black ink in positive except for dual-image games. The possible black play symbols are: APPLE SYMBOL, ORANGE SYMBOL, MELON SYMBOL, BANANA SYMBOL, STAR SYMBOL, LEMON SYMBOL, BELL SYMBOL, HORSE SHOE SYMBOL, CLOVER SYMBOL, GOLD BAR SYMBOL, SEVEN SYMBOL, WISHBONE SYMBOL, CROWN SYMBOL, DIAMOND SYMBOL, CHERRY SYMBOL, $1.00, $2.00, $4.00, $5.00, $10.00, $20.00, $40.00, $100 and $1,000.

D. Play Symbol Caption - the printed material appearing below each Play Symbol which explains the Play Symbol. One caption appears under each Play Symbol and is printed in caption font in black ink

in positive. The Play Symbol Caption which corresponds with and verifies each Play Symbol is as follows:

Figure 1: GAME NO. 1133 - 1.2D

PLAY SYMBOL	CAPTION
APPLE SYMBOL	APL
ORANGE SYMBOL	ORG
MELON SYMBOL	MEL
BANANA SYMBOL	BAN
STAR SYMBOL	STA
LEMON SYMBOL	LEM
BELL SYMBOL	BEL
HORSE SHOE SYMBOL	SHO
CLOVER SYMBOL	CLO
GOLD BAR SYMBOL	BAR
SEVEN SYMBOL	SVN
WISHBONE SYMBOL	WBN
CROWN SYMBOL	CRN
DIAMOND SYMBOL	DMD
CHERRY SYMBOL	AUTO
$1.00	ONE$
$2.00	TWO$
$4.00	FOUR$
$5.00	FIVE$
$10.00	TEN$
$20.00	TWENTY
$40.00	FORTY
$100	ONE HUND
$1,000	ONE THOU

E. Serial Number - A unique 14 (fourteen) digit number appearing under the latex scratch-off covering on the front of the ticket. There will be a four (4)-digit "security number" which will be individually boxed and randomly placed within the number. The remaining ten (10) digits of the Serial Number are the Validation Number. The Serial Number is positioned beneath the bottom row of play data in the scratched-off play area. The Serial Number is for validation purposes and cannot be used to play the game. The format will be: 00000000000000.

F. Low-Tier Prize - A prize of $1.00, $2.00, $4.00, $5.00, $10.00 or $20.00.

G. Mid-Tier Prize - A prize of $40.00 or $100.

H. High-Tier Prize - A prize of $1,000.

I. Bar Code - A 24 (twenty-four) character interleaved two (2) of five (5) bar code which will include a four (4) digit game ID, the seven (7) digit pack number, the three (3) digit ticket number and the ten (10) digit Validation Number. The bar code appears on the back of the ticket.

J. Pack-Ticket Number - A 14 (fourteen) digit number consisting of the four (4) digit game number (1133), a seven (7) digit pack number, and a three (3) digit ticket number. Ticket numbers start with 001 and end with 150 within each pack. The format will be: 1133-0000001-001.

K. Pack - A pack of "LUCKY SLOTS" Instant Game tickets contains 150 tickets, packed in plastic shrink-wrapping and fanfolded in pages of five (5). Tickets 001 to 005 will be on the top page; tickets 006 to 010 on the next page; etc.; and tickets 146 to 150 will be on the last page with backs exposed. Ticket 001 will be folded over so the front of ticket 001 and 010 will be exposed.

L. Non-Winning Ticket - A ticket which is not programmed to be a winning ticket or a ticket that does not meet all of the requirements of these Game Procedures, the State Lottery Act (Texas Government Code, Chapter 466), and applicable rules adopted by the Texas Lottery pursuant to the State Lottery Act and referenced in 16 TAC, Chapter 401.

M. Ticket or Instant Game Ticket, or Instant Ticket - A Texas Lottery "LUCKY SLOTS" Instant Game No. 1133 ticket.

2.0 Determination of Prize Winners. The determination of prize winners is subject to the general ticket validation requirements set forth in Texas Lottery Rule 401.302, Instant Game Rules, these Game Proce-

dures, and the requirements set out on the back of each instant ticket. A prize winner in the "LUCKY SLOTS" Instant Game is determined once the latex on the ticket is scratched off to expose 16 (sixteen) Play symbols. If a player reveals 3 matching symbols within a GAME, the player wins the PRIZE for that GAME. If a player reveals a "CHERRY" symbol, the player wins the PRIZE for that GAME instantly. No portion of the display printing nor any extraneous matter whatsoever shall be usable or playable as a part of the Instant Game.

2.1 Instant Ticket Validation Requirements.

A. To be a valid Instant Game ticket, all of the following requirements must be met:

1. Exactly 16 (sixteen) Play Symbols must appear under the latex overprint on the front portion of the ticket;

2. Each of the Play Symbols must have a Play Symbol Caption underneath, unless specified, and each Play Symbol must agree with its Play Symbol Caption;

3. Each of the Play Symbols must be present in its entirety and be fully legible;

4. Each of the Play Symbols must be printed in black ink except for dual image games;

5. The ticket shall be intact;

6. The Serial Number, Retailer Validation Code and Pack-Ticket Number must be present in their entirety and be fully legible;

7. The Serial Number must correspond, using the Texas Lottery's codes, to the Play Symbols on the ticket;

8. The ticket must not have a hole punched through it, be mutilated, altered, unreadable, reconstituted or tampered with in any manner;

9. The ticket must not be counterfeit in whole or in part;

10. The ticket must have been issued by the Texas Lottery in an authorized manner;

11. The ticket must not have been stolen, nor appear on any list of omitted tickets or non-activated tickets on file at the Texas Lottery;

12. The Play Symbols, Serial Number, Retailer Validation Code and Pack-Ticket Number must be right side up and not reversed in any manner;

13. The ticket must be complete and not miscut, and have exactly 16 (sixteen) Play Symbols under the latex overprint on the front portion of the ticket, exactly one Serial Number, exactly one Retailer Validation Code, and exactly one Pack-Ticket Number on the ticket;

14. The Serial Number of an apparent winning ticket shall correspond with the Texas Lottery's Serial Numbers for winning tickets, and a ticket with that Serial Number shall not have been paid previously;

15. The ticket must not be blank or partially blank, misregistered, defective or printed or produced in error;

16. Each of the 16 (sixteen) Play Symbols must be exactly one of those described in Section 1.2.C of these Game Procedures.

17. Each of the 16 (sixteen) Play Symbols on the ticket must be printed in the Symbol font and must correspond precisely to the artwork on file at the Texas Lottery; the ticket Serial Numbers must be printed in the Serial font and must correspond precisely to the artwork on file at the Texas Lottery; and the Pack-Ticket Number must be printed in the Pack-Ticket Number font and must correspond precisely to the artwork on file at the Texas Lottery;

18. The display printing on the ticket must be regular in every respect and correspond precisely to the artwork on file at the Texas Lottery; and

19. The ticket must have been received by the Texas Lottery by applicable deadlines.

B. The ticket must pass all additional validation tests provided for in these Game Procedures, the Texas Lottery's Rules governing the award of prizes of the amount to be validated, and any confidential validation and security tests of the Texas Lottery.

C. Any Instant Game ticket not passing all of the validation requirements is void and ineligible for any prize and shall not be paid. However, the Executive Director may, solely at the Executive Director's discretion, refund the retail sales price of the ticket. In the event a defective ticket is purchased, the only responsibility or liability of the Texas Lottery shall be to replace the defective ticket with another unplayed ticket in that Instant Game (or a ticket of equivalent sales price from any other current Instant Lottery game) or refund the retail sales price of the ticket, solely at the Executive Director's discretion.

2.2 Programmed Game Parameters.

A. Consecutive non-winning tickets in a pack will not have identical play data, spot for spot.

B. No duplicate non-winning prize symbols on a ticket.

C. No duplicate non-winning games on a ticket (in any order).

D. Non-winning prize symbols will never be the same as the winning prize symbol(s).

E. The CHERRY (auto win) play symbol will only appear once on a ticket.

F. There will be many near wins (two matching symbols within a game) on a ticket.

G. The top prize will appear on every ticket unless otherwise restricted by the prize structure.

2.3 Procedure for Claiming Prizes.

A. To claim a "LUCKY SLOTS" Instant Game prize of $1.00, $2.00, $4.00, $5.00, $10.00, $20.00, $40.00 or $100, a claimant shall sign the back of the ticket in the space designated on the ticket and present the winning ticket to any Texas Lottery Retailer. The Texas Lottery Retailer shall verify the claim and, if valid, and upon presentation of proper identification, if appropriate, make payment of the amount due the claimant and physically void the ticket; provided that the Texas Lottery Retailer may, but is not required, to pay a $40.00 or $100 ticket. In the event the Texas Lottery Retailer cannot verify the claim, the Texas Lottery Retailer shall provide the claimant with a claim form and instruct the claimant on how to file a claim with the Texas Lottery. If the claim is validated by the Texas Lottery, a check shall be forwarded to the claimant in the amount due. In the event the claim is not validated, the claim shall be denied and the claimant shall be notified promptly. A claimant may also claim any of the above prizes under the procedure described in Section 2.3.B and Section 2.3.C of these Game Procedures.

B. To claim a "LUCKY SLOTS" Instant Game prize of $1,000, the claimant must sign the winning ticket and present it at one of the Texas Lottery's Claim Centers. If the claim is validated by the Texas Lottery, payment will be made to the bearer of the validated winning ticket for that prize upon presentation of proper identification. When paying a prize of $600 or more, the Texas Lottery shall file the appropriate income reporting form with the Internal Revenue Service (IRS) and shall withhold federal income tax at a rate set by the IRS if required. In

the event that the claim is not validated by the Texas Lottery, the claim shall be denied and the claimant shall be notified promptly.

C. As an alternative method of claiming a "LUCKY SLOTS" Instant Game prize, the claimant must sign the winning ticket, thoroughly complete a claim form, and mail both to: Texas Lottery Commission, Post Office Box 16600, Austin, Texas 78761-6600. The risk of sending a ticket remains with the claimant. In the event that the claim is not validated by the Texas Lottery, the claim shall be denied and the claimant shall be notified promptly.

D. Prior to payment by the Texas Lottery of any prize, the Texas Lottery shall deduct a sufficient amount from the winnings of a person who has been finally determined to be:

1. delinquent in the payment of a tax or other money collected by the Comptroller, the Texas Workforce Commission, or Texas Alcoholic Beverage Commission;

2. delinquent in making child support payments administered or collected by the Attorney General; or

3. delinquent in reimbursing the Texas Health and Human Services Commission for a benefit granted in error under the food stamp program or the program of financial assistance under Chapter 31, Human Resources Code;

4. in default on a loan made under Chapter 52, Education Code; or

5. in default on a loan guaranteed under Chapter 57, Education Code.

E. If a person is indebted or owes delinquent taxes to the State, other than those specified in the preceding paragraph, the winnings of a person shall be withheld until the debt or taxes are paid.

2.4 Allowance for Delay of Payment. The Texas Lottery may delay payment of the prize pending a final determination by the Executive Director, under any of the following circumstances:

A. if a dispute occurs, or it appears likely that a dispute may occur, regarding the prize;

B. if there is any question regarding the identity of the claimant;

C. if there is any question regarding the validity of the ticket presented for payment; or

D. if the claim is subject to any deduction from the payment otherwise due, as described in Section 2.3.D of these Game Procedures. No liability for interest for any delay shall accrue to the benefit of the claimant pending payment of the claim.

2.5 Payment of Prizes to Persons Under 18. If a person under the age of 18 years is entitled to a cash prize of less than $600 from the "LUCKY SLOTS" Instant Game, the Texas Lottery shall deliver to an adult member of the minor's family or the minor's guardian a check or warrant in the amount of the prize payable to the order of the minor.

2.6 If a person under the age of 18 years is entitled to a cash prize of more than $600 from the "LUCKY SLOTS" Instant Game, the Texas Lottery shall deposit the amount of the prize in a custodial bank account, with an adult member of the minor's family or the minor's guardian serving as custodian for the minor.

2.7 Instant Ticket Claim Period. All Instant Game prizes must be claimed within 180 days following the end of the Instant Game or within the applicable time period for certain eligible military personnel as set forth in Texas Government Code §466.408. Any prize not claimed within that period, and in the manner specified in these Game Procedures and on the back of each ticket, shall be forfeited.

2.8 Disclaimer. The number of prizes in a game is approximate based on the number of tickets ordered. The number of actual prizes available in a game may vary based on number of tickets manufactured, testing, distribution, sales and number of prizes claimed. An Instant Game ticket may continue to be sold even when all the top prizes have been claimed.

3.0 Instant Ticket Ownership.

A. Until such time as a signature is placed upon the back portion of an Instant Game ticket in the space designated, a ticket shall be owned by the physical possessor of said ticket. When a signature is placed on the back of the ticket in the space designated, the player whose signature appears in that area shall be the owner of the ticket and shall be entitled to any prize attributable thereto. Notwithstanding any name or names submitted on a claim form, the Executive Director shall make payment to the player whose signature appears on the back of the ticket in the space designated. If more than one name appears on the back of the ticket, the Executive Director will require that one of those players whose name appears thereon be designated by such players to receive payment.

B. The Texas Lottery shall not be responsible for lost or stolen Instant Game tickets and shall not be required to pay on a lost or stolen Instant Game ticket.

4.0 Number and Value of Instant Prizes. There will be approximately 9,120,000 tickets in the Instant Game No. 1133. The approximate number and value of prizes in the game are as follows:

Figure 2: GAME NO. 1133 - 4.0

Prize Amount	Approximate Number of Winners*	Approximate Odds are 1 in**
$1	547,200	16.67
$2	912,000	10.00
$4	228,000	40.00
$5	60,800	150.00
$10	60,800	150.00
$20	26,600	342.86
$40	14,820	615.38
$100	760	12,000.00
$1,000	76	120,000.00

*The number of prizes in a game is approximate based on the number of tickets ordered. The number of actual prizes available in a game may vary based on number of tickets manufactured, testing, distribution, sales and number of prizes claimed.

**The overall odds of winning a prize are 1 in 4.93. The individual odds of winning for a particular prize level may vary based on sales, distribution, testing, and number of prizes claimed.

A. The actual number of tickets in the game may be increased or decreased at the sole discretion of the Texas Lottery Commission.

5.0 End of the Instant Game. The Executive Director may, at any time, announce a closing date (end date) for the Instant Game No. 1133 without advance notice, at which point no further tickets in that game may be sold.

6.0 Governing Law. In purchasing an Instant Game ticket, the player agrees to comply with, and abide by, these Game Procedures for Instant Game No. 1133, the State Lottery Act (Texas Government Code, Chapter 466), applicable rules adopted by the Texas Lottery pursuant to the State Lottery Act and referenced in 16 TAC, Chapter 401, and all final decisions of the Executive Director.

TRD-200804728
Kimberly L. Kiplin
General Counsel
Texas Lottery Commission
Filed: September 3, 2008

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North East Texas Regional Mobility Authority

Notice of Availability of Request for Statements of Interest for Financial and/or Development Partners

The North East Texas Regional Mobility Authority ("NET RMA") is soliciting statements of interest from firms interested in serving as financial and/or development partners in connection with the development of various potential projects of the Authority (the "Projects") throughout a twelve-county region. The Authority's principal project is Toll 49, which consists of proposed outer loops around Tyler and Longview, Texas and a series of controlled-access roads connecting the Tyler and Longview outer loops and extending them to the east to connect with the I-69 Trans Texas Corridor. A portion of Toll 49 has already been constructed and is in revenue operation, and the Authority is seeking the means by which to complete that project.

Firms responding to the request for statements of interest must demonstrate a history and the capability of developing and/or providing capital investment in public infrastructure projects. Consistent with the requirements of Senate Bill 792, the NET RMA will not enter into any concession agreements in connection with the development of any or all of the Projects.

Copies of the request for statements of interest may be obtained by accessing the NET RMA website at www.netrma.org, or by e-mailing Mr. Everett Owen, Project Director, at emowen@ctrma.org. Responses must be received no later than 4:00 p.m. CST, October 6, 2008 to be eligible for consideration.

TRD-200804708
Jeff Austin, III
Chairman
North East Texas Regional Mobility Authority
Filed: September 2, 2008

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Texas Department of Public Safety

Consultant Services Award

In accordance with §2254.030 of the Texas Government Code, the Texas Department of Public Safety (TXDPS) announces the award of the contract pursuant to Request for Qualifications to 405-HQ8-9111- REPOST Agreement for Internal Audit and Risk Assessment Services of the Texas Department of Public Safety (RFQ #405-HQ8-9111), which was published in the June 20, 2008, issue of the *Texas Register* (33 TexReg 4931).

A description of the work to be performed under the contract:

Clifton Gunderson LLP will provide TXDPS governmental auditing, accounting expertise and risk assessment services for fiscal years 2008 through 2009. They will (a) complete certain internal audit projects; (b) evaluate and contribute to the improvement of risk management and control processes within the Department; and (c) provide internal

auditing services to include risk assessments, informal and formal advice, analysis, or assessments of Department business processes, governance processes, and related controls.

Name and business address of the consultant selected:

Clifton Gunderson LLP

9600 North MoPac Expressway, Suite 325

Austin, Texas 78759

The amount of the contract:

$500,000.00

Beginning and ending dates of the contract:

The contract became effective on August 26, 2008 for one (1) year.

TXDPS reserves the right to renew this contract, in whole or in part under the same terms and conditions, for up to three (3) years in increments of up to one (1) year each. In no case shall the full term of the contract including extensions exceed four (4) years. TXDPS will exercise this option by providing written notice to the Contractor not less than sixty (60) days prior to the expiration of this contract. Any renewal will only become effective after both Parties sign a document to renew this contract.

In addition to the rights granted to TXDPS above, TXDPS also has the right, at its own election, to extend the contract for ninety (90) days beyond the expiration of any initial or renewal term. TXDPS will exercise this unilateral right by providing notice to the Contractor before the end of any initial or renewal term of the contract without the necessity of the Contractor's approval or signature.

Date for completion of work to be performed:

There are various deadlines for the current deliverables under this contract, ranging from September 29, 2008, for the first audit project to December 5, 2008, for the first risk assessment. However, TXDPS has the right to order additional deliverables under this contract.

TRD-200804680
Thomas A. Davis, Jr.
Director
Texas Department of Public Safety
Filed: August 28, 2008

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Hazard Mitigation Grant Program FEMA-1780-DR

As a result of Hurricane Dolly a major disaster (FEMA-1780-DR) was declared by the President on July 24, 2008. Due to this declaration, Texas is authorized federal funds through the Hazard Mitigation Grant Program (HMGP). This program is a 75/25 federal to local cost-share program by the Federal Emergency Management Agency (FEMA), and administered by the State of Texas. The HMGP is a mitigation grant with a single mission to provide a means to:

* prevent or reduce future losses to lives and property through the identification and funding of cost-effective mitigation measures.

* minimize the costs of future disaster response and recovery.

The HMGP can fund mitigation measures that protect both public and private property, so long as the measures fit within the overall mitigation strategy for the disaster area, are cost effective, and comply with all federal and state program guidelines.

All eligible applicants, which include local governments, state agencies, certain non-profit organizations and institutions, and Indian tribes or authorized tribal organizations are invited and encouraged to take advantage of this opportunity and apply for HMGP funds. These funds will be allocated to applicants based on a competitive application process.

If your organization is interested in participating in the HMGP process, you are invited to submit a Notice of Interest to be postmarked by midnight on October 17, 2008, to the Texas Hazard Mitigation Officer, Texas Department of Public Safety, Division of Emergency Management, P.O. Box 4087, Austin, Texas 78773-0226, or by e-mail to hildy.soper@txdps.state.tx.us or by fax to (512) 424-5647. The HMGP application deadline for this disaster will be midnight on January 30, 2009. Detailed information including an HMGP Fact Sheet and the forms to use for development and submission of both a notice of interest (NOI) and a complete HMGP application are available on the Department of Public Safety/Governor's Division of Emergency Management website located at the following address: http://www.txdps.state.tx.us/dem/pages/downloadableforms.htm#hmgpgrants.

If you have questions or need assistance, please contact state Mitigation Grants Officer, Hildy Soper at (512) 424-2454 or by e-mail to: hildy.soper@txdps.state.tx.us.

TRD-200804679
Thomas A. Davis, Jr.
Director
Texas Department of Public Safety
Filed: August 28, 2008

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Public Utility Commission of Texas

Announcement of Application for an Amendment to a State-Issued Certificate of Franchise Authority

The Public Utility Commission of Texas received an application on August 27, 2008, for an amendment to a state-issued certificate of franchise authority (CFA), pursuant to §§66.001 - 66.016 of the Public Utility Regulatory Act (PURA).

Project Title and Number: Application of Friendship Cable of Texas, Inc., d/b/a Suddenlink Communications for an Amendment to a State-Issued Certificate of Franchise Authority, Project Number 36062 before the Public Utility Commission of Texas.

The requested amended CFA service area includes the city limits of Henrietta, Texas.

Information on the application may be obtained by contacting the Public Utility Commission of Texas by mail at P.O. Box 13326, Austin, Texas 78711-3326, or by phone at (512) 936-7120 or toll free at 1-888-782-8477. Hearing and speech-impaired individuals with text telephone (TTY) may contact the commission at (512) 936-7136 or toll free at 1-800-735-2989. All inquiries should reference Project Number 36062.

TRD-200804715
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: September 2, 2008

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Announcement of Application for an Amendment to a State-Issued Certificate of Franchise Authority

The Public Utility Commission of Texas received an application on August 27, 2008, for an amendment to a state-issued certificate of fran-

chise authority (CFA), pursuant to §§66.001 - 66.016 of the Public Utility Regulatory Act (PURA).

Project Title and Number: Application of Universal Cable Holdings, Inc., d/b/a Suddenlink Communications for an Amendment to a State-Issued Certificate of Franchise Authority, Project Number 36063 before the Public Utility Commission of Texas.

The requested amended CFA service area includes the city limits of Post, Texas.

Information on the application may be obtained by contacting the Public Utility Commission of Texas by mail at P.O. Box 13326, Austin, Texas 78711-3326, or by phone at (512) 936-7120 or toll free at 1-888-782-8477. Hearing and speech-impaired individuals with text telephone (TTY) may contact the commission at (512) 936-7136 or toll free at 1-800-735-2989. All inquiries should reference Project Number 36063.

TRD-200804716
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: September 2, 2008

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Announcement of Application for State-Issued Certificate of Franchise Authority

The Public Utility Commission of Texas received an application on August 26, 2008, for a state-issued certificate of franchise authority (CFA), pursuant to §§66.001 - 66.016 of the Public Utility Regulatory Act (PURA).

Project Title and Number: Application of Central Texas Cable Partners, Inc. d/b/a Reveille Broadband for a State-Issued Certificate of Franchise Authority, Project Number 36059 before the Public Utility Commission of Texas.

The requested CFA service area includes: (1) the City of Lexington, Lee County, Texas; (2) Lake Thunderbird Estates and Indian Lake Estates (unincorporated subdivisions) in Smithville, Bastrop County, Texas; and (3) Birch Creek Estates, Birch Creek Forest Estates, Birch Creek Village, Park Road 57 south of FM 60, Park Road 4 south of FM 60, Indian Hills Estates (unincorporated subdivisions) in Somerville, Burleson County, Texas.

Information on the application may be obtained by contacting the Public Utility Commission of Texas by mail at P.O. Box 13326, Austin, Texas 78711-3326, or by phone at (512) 936-7120 or toll free at 1-888-782-8477. Hearing and speech-impaired individuals with text telephone (TTY) may contact the commission at (512) 936-7136 or toll free at 1-800-735-2989. All inquiries should reference Project Number 36059.

TRD-200804703
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: August 29, 2008

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Notice of Application for a Certificate to Provide Retail Electric Service

Notice is given to the public of the filing with the Public Utility Commission of Texas of an application on August 28, 2008, for retail electric provider (REP) certification, pursuant to §§39.101 - 39.109 of the Public Utility Regulatory Act (PURA).

Docket Title and Number: Application of TexRep3, LLC for Retail Electric Provider (REP) Certification, Docket Number 36073 before the Public Utility Commission of Texas.

Applicant's requested service area includes the geographic area of the Electric Reliability Council of Texas.

Persons wishing to comment upon the action sought should contact the Public Utility Commission of Texas by mail at P.O. Box 13326, Austin, Texas 78711-3326, or by phone at (512) 936-7120 or toll free at 1-888-782-8477 no later than September 19, 2008. Hearing and speech-impaired individuals with text telephone (TTY) may contact the commission at (512) 936-7136 or toll free at 1-800-735-2989. All comments should reference Docket Number 36073.

TRD-200804718
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: September 2, 2008

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Notice of Application for a Certificate to Provide Retail Electric Service

Notice is given to the public of the filing with the Public Utility Commission of Texas of an application on August 28, 2008, for retail electric provider (REP) certification, pursuant to §§39.101 - 39.109 of the Public Utility Regulatory Act (PURA).

Docket Title and Number: Application of TexRep4, LLC for Retail Electric Provider (REP) Certification, Docket Number 36074 before the Public Utility Commission of Texas.

Applicant's requested service area is the geographic area of the Electric Reliability Council of Texas.

Persons wishing to comment upon the action sought should contact the Public Utility Commission of Texas by mail at P.O. Box 13326, Austin, Texas 78711-3326, or by phone at (512) 936-7120 or toll free at 1-888-782-8477 no later than September 19, 2008. Hearing and speech-impaired individuals with text telephone (TTY) may contact the commission at (512) 936-7136 or toll free at 1-800-735-2989. All comments should reference Docket Number 36074.

TRD-200804719
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: September 2, 2008

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Notice of Application for Amendment to Certificated Service Area Boundary

Notice is given to the public of an application filed on August 28, 2008, with the Public Utility Commission of Texas for an amendment to a certificated service area boundary in Bell County, Texas.

Docket Style and Number: Application of AT&T Texas to Amend a Certificate of Convenience and Necessity for a Minor Boundary Amendment between its Belton and Temple Exchanges. Docket Number 36080.

The Application: AT&T Texas seeks a minor boundary amendment between its Belton and Temple exchanges. The proposed boundary

amendment will transfer a small portion of serving area from the Temple exchange to the Belton exchange to accurately reflect the way service is currently being provisioned to this area.

Persons wishing to comment on the action sought or intervene should contact the Public Utility Commission of Texas by September 19, 2008, by mail at P.O. Box 13326, Austin, Texas 78711-3326, or by phone at (512) 936-7120 or toll-free at 1-888-782-8477. Hearing and speech-impaired individuals with text telephone (TTY) may contact the commission at (512) 936-7136 or use Relay Texas (toll-free) 1-800-735-2989. All comments should reference Docket Number 36080.

TRD-200804704
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: August 29, 2008

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Notice of Application for Amendment to Service Provider Certificate of Operating Authority

On August 28, 2008, Lightyear Network Solutions, LLC filed an application with the Public Utility Commission of Texas (commission) to amend its service provider certificate of operating authority (SPCOA) granted in SPCOA Certificate Number 60353. Applicant intends to reflect a change in corporate restructuring.

The Application: Application of Lightyear Network Solutions, LLC for an Amendment to its Service Provider Certificate of Operating Authority, Docket Number 36075.

Persons wishing to comment on the action sought should contact the Public Utility Commission of Texas by mail at P.O. Box 13326, Austin, Texas, 78711-3326, or by phone at (512) 936-7120 or toll free at 1-888-782-8477 no later than September 17, 2008. Hearing and speech-impaired individuals with text telephones (TTY) may contact the commission at (512) 936-7136 or toll free at 1-800-735-2989. All comments should reference Docket Number 36075.

TRD-200804720
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: September 2, 2008

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Notice of Application for Amendment to Service Provider Certificate of Operating Authority

On August 28, 2008, Get A Phone filed an application with the Public Utility Commission of Texas (commission) to amend its service provider certificate of operating authority (SPCOA) granted in SPCOA Certificate Number 60530. Applicant intends to reflect a change in ownership/control and a name change.

The Application: Application of Get A Phone for an Amendment to its Service Provider Certificate of Operating Authority, Docket Number 36081.

Persons wishing to comment on the action sought should contact the Public Utility Commission of Texas by mail at P.O. Box 13326, Austin, Texas 78711-3326, or by phone at (512) 936-7120 or toll free at 1-888-782-8477 no later than September 17, 2008. Hearing and speech-impaired individuals with text telephones (TTY) may contact the commission at (512) 936-7136 or toll free at 1-800-735-2989. All comments should reference Docket Number 36081.

TRD-200804725
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: September 2, 2008

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Notice of Application for Designation as an Eligible Telecommunications Carrier and Eligible Telecommunications Provider

Notice is given to the public of an application filed with the Public Utility Commission of Texas on August 28, 2008, for designation as an eligible telecommunications carrier (ETC) and eligible telecommunications provider (ETP) pursuant to P.U.C. Substantive Rule §26.418 and §26.417, respectively.

Docket Title and Number: Application of Worldcall Interconnect Inc. for Designation as an Eligible Telecommunications Carrier and Eligible Telecommunications Provider. Docket Number 36077.

The Application: Worldcall Interconnect Inc. is requesting ETC/ETP designation in order to be eligible to receive federal and state universal service funding to assist it in providing universal service in Texas. Pursuant to 47 U.S.C. §214(e), the commission, either upon its own motion or upon request, shall designate qualifying common carriers as ETCs and ETPs for service areas set forth by the commission. Worldcall Interconnect Inc. seeks ETC/ETP designation in the geographic area represented by the designated AT&T Wire Centers in order to receive support from the Federal Universal Service Fund.

Persons who wish to comment upon the action sought should contact the Public Utility Commission of Texas by October 9, 2008. Requests for further information should be mailed to the Public Utility Commission of Texas, P.O. Box 13326, Austin, Texas 78711-3326, or you may call the Public Utility Commission's Customer Protection Division at (512) 936-7120 or (888) 782-8477. Hearing and speech-impaired individuals with text telephones (TTY) may contact the commission at (512) 936-7136 or use Relay Texas (800) 735-2989 to reach the commission's toll free number (888) 782-8477. All comments should reference Docket Number 36077.

TRD-200804721
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: September 2, 2008

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Notice of Application for Review of the Cost of Decommissioning Units 1 and 2 of the South Texas Project

Notice is given to the public of an application for review of the cost of decommissioning Units 1 and 2 of the South Texas Nuclear Project filed with the Public Utility Commission of Texas on August 18, 2008, pursuant to the Public Utility Regulatory Act, Texas Utilities Code Annotated §§14.001, 14.002, 39.205 (Vernon 2007 and Supp. 2008) (PURA).

Docket Style and Number: Notice by the San Antonio City Public Service Board of Receipt of Updated Decommissioning Study and Filing Pursuant to PUCT Substantive Rule §25.202(f)(4)(A); Docket Number 35786.

The Application: The City of San Antonio, Texas, acting by and through the City Public Service Board of Trustees (CPS Energy) filed a review of the costs of decommissioning the 12% undivided interest

in the South Texas Nuclear Project Units 1 and 2 (STP) that CPS Energy purchased in 2005 from AEP Texas Central Company (AEP Texas Central) (the 12% AEP Texas Central-Funded Interest). On September 2, 2008, CPS Energy filed corrected exhibits in support of decreasing costs of decommissioning STP Units 1 and 2. Specifically, CPS Energy seeks approval to (1) decrease the collection amount of decommissioning contributions to the 12% AEP Texas Central-Funded Interest until further request; (2) create and fund the spent fuel management subaccount in the 12% AEP Texas Central-Funded Interest by allocating 22.87% of the existing balances into the new fuel subaccount for STP Unit 1 and 19.54% of the existing balance into the new spent fuel management subaccount for STP Unit 2; and (3) create and fund the pre-decommissioning cost subaccount for the 12% AEP Texas Central-Funded Trust for STP Units 1 and 2.

Persons who wish to intervene in the proceeding or comment upon the action sought should contact the Public Utility Commission of Texas, P.O. Box 13326, Austin, Texas 78711-3326, or call the commission's Office of Customer Protection at (512) 936-7120 or (888) 782-8477. Hearing-and speech-impaired individuals with text telephones (TTY) may contact the commission at (512) 936-7136 or use Relay Texas (toll-free) 1-800-735-2989. All correspondence should refer to Docket Number 35786.

TRD-200804748
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: September 3, 2008

♦ ♦ ♦

Notice of Application for Service Provider Certificate of Operating Authority

Notice is given to the public of the filing with the Public Utility Commission of Texas of an application on August 27, 2008, for a service provider certificate of operating authority (SPCOA), pursuant to §§54.151 - 54.156 of the Public Utility Regulatory Act (PURA).

Docket Title and Number: Application of Asian American Association Telecom Services for a Service Provider Certificate of Operating Authority, Docket Number 36069 before the Public Utility Commission of Texas.

Applicant intends to provide plain old telephone service, and long distance services.

Applicant's requested SPCOA geographic area includes the area of Texas currently served by Southwestern Bell Telephone Company d/b/a AT&T Texas.

Persons who wish to comment upon the action sought should contact the Public Utility Commission of Texas by mail at P.O. Box 13326, Austin, Texas 78711-3326, or by phone at (512) 936-7120 or toll free at 1-888-782-8477 no later than September 17, 2008. Hearing and speech-impaired individuals with text telephone (TTY) may contact the commission at (512) 936-7136 or toll free at 1-800-735-2989. All comments should reference Docket Number 36069.

TRD-200804717
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: September 2, 2008

♦ ♦ ♦

Notice of Application to Relinquish a Service Provider Certificate of Operating Authority

On August 26, 2008, Go-Comm, Inc. filed an application with the Public Utility Commission of Texas (commission) to relinquish its service provider certificate of operating authority (SPCOA) granted in SPCOA Certificate Number 60137. Applicant intends to relinquish its certificate.

The Application: Application of Go-Comm, Inc. to Relinquish its Service Provider Certificate of Operating Authority, Docket Number 36058.

Persons wishing to comment on the action sought should contact the Public Utility Commission of Texas by mail at P.O. Box 13326, Austin, Texas, 78711-3326, or by phone at (512) 936-7120 or toll free at 1-888-782-8477 no later than September 17, 2008. Hearing and speech-impaired individuals with text telephones (TTY) may contact the commission at (512) 936-7136 or toll free at 1-800-735-2989. All comments should reference Docket Number 36058.

TRD-200804702
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: August 29, 2008

♦ ♦ ♦

Notice of Intent to File LRIC Study Pursuant to P.U.C. Substantive Rule §26.214

Notice is given to the public of the filing on August 28, 2008, with the Public Utility Commission of Texas (commission), a notice of intent to file a long run incremental cost (LRIC) study pursuant to P.U.C. Substantive Rule §26.214. The Applicant will file the LRIC study on or about September 3, 2008.

Docket Title and Number: Application of Central Telephone Company of Texas d/b/a Embarq for Approval of LRIC Study for Centrex Service II Standard and Optional Features Pursuant to P.U.C. Substantive Rule §26.214, Docket Number 36078.

Any party that demonstrates a justiciable interest may file with the administrative law judge, written comments or recommendations concerning the LRIC study referencing Docket Number 36078. Written comments or recommendations should be filed no later than 45 days after the date of a sufficient study and should be filed at the Public Utility Commission of Texas, by mail at P.O. Box 13326, Austin, Texas 78711-3326, or by phone at (512) 936-7120 or toll free at 1-888-782-8477. Hearing and speech-impaired individuals with text telephones (TTY) may contact the commission at (512) 936-7136 or toll free 1-800-735-2989. All comments should reference Docket Number 36078.

TRD-200804723
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: September 2, 2008

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Notice of Intent to File LRIC Study Pursuant to P.U.C. Substantive Rule §26.214

Notice is given to the public of the filing on August 28, 2008, with the Public Utility Commission of Texas (commission), a notice of intent to file a long run incremental cost (LRIC) study pursuant to P.U.C.

Substantive Rule §26.214. The Applicant will file the LRIC study on or about September 3, 2008.

Docket Title and Number: Application of United Telephone Company of Texas, Inc. d/b/a Embarq for Approval of LRIC Study for Centrex Service II Standard and Optional Features Pursuant to P.U.C. Substantive Rule §26.214, Docket Number 36079.

Any party that demonstrates a justiciable interest may file with the administrative law judge, written comments or recommendations concerning the LRIC study referencing Docket Number 36079. Written comments or recommendations should be filed no later than 45 days after the date of a sufficient study and should be filed at the Public Utility Commission of Texas, by mail at P.O. Box 13326, Austin, Texas 78711-3326, or by phone at (512) 936-7120 or toll free at 1-888-782-8477. Hearing and speech-impaired individuals with text telephones (TTY) may contact the commission at (512) 936-7136 or toll free 1-800-735-2989. All comments should reference Docket Number 36079.

TRD-200804724
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: September 2, 2008

♦ ♦ ♦

Notice of Intent to File LRIC Study Pursuant to P.U.C. Substantive Rule §26.215

Notice is given to the public of the filing on September 2, 2008, with the Public Utility Commission of Texas (commission), a notice of intent to file a long run incremental cost (LRIC) study pursuant to P.U.C. Substantive Rule §26.215. The Applicant will file the LRIC study on or after September 11, 2008.

Docket Title and Number: Application of Verizon Southwest, Inc. for Approval of LRIC Study for TLS Premier Access Line (10 Mbps) Pursuant to P.U.C. Substantive Rule §26.215; Docket Number 36101.

Any party that demonstrates a justiciable interest may file with the administrative law judge, written comments or recommendations concerning the LRIC study referencing Docket Number 36101. Written comments or recommendations should be filed no later than 45 days after the date of a sufficient study and should be filed at the Public Utility Commission of Texas, by mail at P.O. Box 13326, Austin, Texas 78711-3326, or by phone at (512) 936-7120 or toll free at 1-888-782-8477. Hearing and speech-impaired individuals with text telephones (TTY) may contact the commission at (512) 936-7136 or toll free at 1-800-735-2989. All comments should reference Docket Number 36101.

TRD-200804749
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: September 3, 2008

♦ ♦ ♦

Notice of Intent to Implement Minor Rate Changes Pursuant to P.U.C. Substantive Rule §26.171

Notice is given to the public of Big Bend Telephone Company, Inc.'s (Big Bend Telephone) application filed with the Public Utility Commission of Texas (commission) on August 29, 2008, for approval of a minor rate change pursuant to P.U.C. Substantive Rule §26.171.

Tariff Control Title and Number: Application of Big Bend Telephone Company, Inc. for Approval of a Minor Rate Change Pursuant to P.U.C. Substantive Rule §26.171; Tariff Control Number 36089.

The Application: Big Bend Telephone filed an application to apply a Premises Visit Charge when customers request service that requires the company to travel to the customer's premises. Additionally, the company proposes to increase the Maintenance of Service Charge, which is applied in those instances where service difficulty or trouble results from the customer-provided or maintained inside wire, jacks and/or equipment which are not in accordance with the technical standards for such inside wire and jacks. The proposed effective date for the proposed rate changes is January 1, 2009. The estimated annual revenue increase recognized by Big Bend Telephone is $26,220 or less than 5% of Big Bend Telephone's gross annual intrastate revenues. Big Bend Telephone has 5,430 access lines (residence and business) in service in the state of Texas.

If the commission receives a complaint(s) relating to this application signed by the lesser of 5% or 218 of the affected local service customers to which this application applies by November 30, 2008, the application will be docketed. The 5% limitation will be calculated based upon the total number of customers of record as of the calendar month preceding the commission's receipt of the complaint(s).

Persons wishing to comment on this application should contact the Public Utility Commission of Texas by November 30, 2008. Requests to intervene should be filed with the commission's Filing Clerk at P.O. Box 13326, Austin, Texas 78711-3326, or you may call the commission at (512) 936-7120 or toll-free 1-800-735-2989. Hearing and speech-impaired individuals with text telephones (TTY) may contact the commission at (512) 936-7136. All correspondence should refer to Tariff Control Number 36089.

TRD-200804726
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: September 2, 2008

♦ ♦ ♦

Public Notice of Workshop on Rulemaking Relating to Electric Providers of Last Resort

The staff of the Public Utility Commission of Texas (commission) will hold a workshop regarding the Provider of Last Resort rulemaking, on Friday, September 19, 2008, at 10:00 a.m. in the Commissioner's Hearing Room, located on the 7th floor of the William B. Travis Building, 1701 North Congress Avenue, Austin, Texas 78701. Project Number 35769, *Rulemaking Relating to Electric Providers of Last Resort* has been established for this proceeding.

Questions concerning the workshop or this notice should be referred to Christine Wright, Competitive Markets Division, (512) 936-7376. Hearing and speech-impaired individuals with text telephones (TTY) may contact the commission at (512) 936-7136.

TRD-200804701
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: August 29, 2008

♦ ♦ ♦

Request for Comments - Proceeding to Establish Policy Relating to Excess Development in Competitive Renewable Energy Zone (CREZ)

(Editor's Note: The Public Utility Commission of Texas published this request for comments in the August 29, 2008, issue of the Texas Register (33 TexReg 7368). The final paragraph regarding the submittal of comments was omitted. The document is being republished in its entirety.)

The Public Utility Commission has initiated a rulemaking project to determine dispatch priorities for the use of CREZ transmission lines, *Proceeding to Establish Policy Relating to Excess Development in Competitive Renewable Energy Zones*, Docket Number 34577. The concern that led to the initiation of this rulemaking is that wind developers might build wind generation in west Texas that significantly exceeds the capacity of the CREZ transmission, imperiling developers' investment in wind generation in CREZs. The early developers could be accorded a priority in dispatch on the basis of the higher level of risk incurred by the early movers (the developers that made expenditures for investigating the wind resource and signing leases for wind farms before the Commission committed to building additional transmission to west Texas) than by late comers.

One of the other issues that the Commission will be facing is identifying which wind developers qualify as CREZ developers. The results of the CREZ proceeding suggest that, absent some limitation on the right to develop or a clear definition of dispatch priority, developers might develop the CREZs to a level that exceeds the CREZ transmission capacity that is built as a result of the Commission's CREZ order. The objective of this rulemaking is to accord the CREZ developers a priority in the use of the transmission system or an equivalent right that will protect their investment, if possible, through the normal operation of real-time market mechanisms and by deterring the development of generation in west Texas by other developers.

One approach to dispatch priority and managing the development in the CREZs is to auction congestion revenue rights (CRRs) for a period of years. CRRs are the standard approach for market participants to manage congestion risks in the nodal market, and CRRs could be used to provide a priority to CREZ developers, without introducing distortions in the economic dispatch of the nodal market. An auction could be conducted well in advance of the completion of CREZ transmission facilities and used to allocate CRRs to CREZ developers. In real time, the CRRs would provide CREZ resources revenue equal to the nodal price differences between the CREZ and other points on the ERCOT system. Because bids in the real-time energy market would reflect the value of production tax credits and renewable energy credits, the price differentials should also reflect these values. From a planning perspective, wind developers would consider the results of the auction for CRRs in making decisions about whether to develop generation resources in west Texas and at what level.

The Commission seeks comments on the feasibility and efficiency of the use of auctioned CRRs to effectuate dispatch priority from the CREZs and impede over-development of the CREZ transmission lines.

The Commission also seeks comments on the requirement that CREZ developers post collateral for the transmission system improvements that will be made to transmit energy from the CREZs to other parts of the state. There are questions that need to be resolved to make the collateral requirements clearer.

1. Is an auction approach like the one outlined above feasible? What processes would need to be established by ERCOT to implement this approach?

2. Is an auction approach likely to protect the revenue expectations of west Texas renewable generators that own CRRs during periods in which the transmission system is congested?

3. Is an auction approach likely to provide a useful and timely market signal to developers about the viability of additional development in renewable generation in west Texas? Explain why or why not.

4. Should the Commission, instead, adopt a physical priority, such as limiting interconnections to the CREZ transmission system? What processes would need to be established by ERCOT to implement this approach?

5. If an auction approach were adopted, how should eligibility to participate in the auction be determined? Should any non-renewable generation facilities, such as clean coal or nuclear generation, have the opportunity to participate?

6. Should any priority dispatch right be transferable from one person to another? If so, what mechanism would be needed to track changes in ownership?

7. If an auction approach used, could it address congestion both within the CREZ and beyond its borders?

8. Regarding the financial commitments in P.U.C. Substantive Rule §25.174(c):

a. How should renewable energy developers' eligibility to post collateral in the certificate of convenience and necessity (CCN) proceedings be determined? If an auction approach is used to address dispatch priority, could the auction be conducted before the collateral is required to be posted and be used to determine eligibility to post collateral?

b. How should the total transmission cost for CREZ transmission facilities be determined? Should it differ by CREZ? Should the cost of base-case upgrades be excluded? Should one developer's collateral amount differ from another? If so, why and how?

c. Should forms of collateral other than letters of credit be permitted?

d. If CCN proceedings are filed at different times, how should the date for posting collateral be determined?

e. What rules and procedures would apply if the total capacity for which CREZ developers post collateral exceeds 100% of CREZ transmission capacity?

Comments shall be submitted to the Filing Clerk, Public Utility Commission of Texas, 1701 North Congress Avenue, P.O. Box 13326, Austin, Texas 78711-3326, no later than September 29, 2008. For further information please contact Danielle Jaussaud, Competitive Markets Division, Public Utility Commission of Texas by phone at (512) 936-7396 or toll free at 1-888-782-8477. Hearing and speech-impaired individuals with text telephones (TTY) may contact the commission at (512) 936-7136 or toll free at 1-800-735-2989. All comments should reference Docket Number 34577.

TRD-200804707
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: September 2, 2008

♦ ♦ ♦

Supreme Court of Texas

Amendments to the Texas Rules of Appellate Procedure

Misc. Docket No. 08-9115

ORDERED that:

1. Pursuant to Section 22.004 of the Texas Government Code, the Texas Rules of Appellate Procedure are amended as follows.

2. By Order dated March 10, 2008, in Misc. Docket No. 08-9017, the Supreme Court proposed amendments to the Texas Rules of Appellate Procedure and invited public comment. Following public comment, the Court made additional revisions to the rules. This Order contains the final version of the amended rules that take effect on September 1, 2008.

3. The comments appended to these amended rules are intended to inform the construction and application of the rules.

4. This Order approves amendments to Texas Rules of Appellate Procedure governing civil cases. By Order dated June 30, 2008, in Misc. Docket No. 08-102, the Court of Criminal Appeals approved amendments to the Texas Rules of Appellate Procedure governing criminal cases. For convenience, all of the amendments are attached to this Order.

5. The Clerk is directed to:

a. file a copy of this Order with the Secretary of State;

b. cause a copy of this Order to be mailed to each registered member of the State Bar of Texas by publication in the *Texas Bar Journal;*

c. send a copy of this Order to each member of the Legislature before December 1; and

d. submit a copy of this Order for publication in the *Texas Register.*

SIGNED AND ENTERED this 20th day of August, 2008.

_____

Wallace B. Jefferson, Chief Justice

_____

Nathan L. Hecht, Justice

_____

Harriet O'Neill, Justice

_____

J. Dale Wainwright, Justice

_____

Scott Brister, Justice

_____

David M. Medina, Justice

_____

Paul W. Green, Justice

_____

Phil Johnson, Justice

_____

Don R. Willett, Justice

Rule 4. Time and Notice Provisions

4.5 No Notice of Judgment or Order of Appellate Court; Effect on Time to File Certain Documents

(a) *Additional Time to File Documents.* A party may move for additional time to file a motion for rehearing or en banc reconsideration in the court of appeals, a petition for review, or a petition for discretionary review, if the party did not--until after the time expired for filing the document--either receive notice of the judgment or order from the clerk or acquire actual knowledge of the rendition of the judgment or order.

* * *

(c) *Where to File.*

(1) A motion for additional time to file a motion for rehearing or en banc reconsideration in the court of appeals must be filed in and ruled on by the court of appeals in which the case is pending.

* * *

(d) *Order of the Court.* If the court finds that the motion for additional time was timely filed and the party did not--within the time for filing the motion for rehearing or en banc reconsideration, petition for review, or petition for discretionary review, as the case may be--receive the notice or have actual knowledge of the judgment or order, the court must grant the motion. The time for filing the document will begin to run on the date when the court grants the motion.

Comment to 2008 change: Subdivision 4.5 is changed, consistent with other changes in the rules, to specifically address a motion for en banc reconsideration and treat it as a motion for rehearing.

Rule 8. Bankruptcy in Civil Cases

8.1 Notice of Bankruptcy. Any party may file a notice that a party is in bankruptcy. The notice must contain:

(a) the bankrupt party's name;

(b) the court in which the bankruptcy proceeding is pending;

(c) the bankruptcy proceeding's style and case number; and

(d) the date when the bankruptcy petition was filed.

Comment to 2008 change: The requirement that the bankruptcy notice contain certain pages of the bankruptcy petition is eliminated, given that electronic filing is now prevalent in bankruptcy courts and bankruptcy petitions are available through the federal PACER system.

Rule 9. Papers Generally

9.3 Number of Copies

* * *

(b) *Supreme Court and Court of Criminal Appeals.* A party must file the original and 11 copies of any document addressed to either the Supreme Court or the Court of Criminal Appeals, except that in the Supreme Court, only an original and two copies must be filed of a motion for extension of time or a response to the motion, and in the Court of Criminal Appeals, only the original must be filed of a motion for extension of time or a response to the motion, or a pleading under Code of Criminal Procedure article 11.07.

* * *

9.8 Protection of Minor's Identity in Parental-Rights Termination Cases and Juvenile Court Cases

(a) *Alias Defined.* For purposes of this rule, an alias means one or more of a person's initials or a fictitious name, used to refer to the person.

(b) *Parental-Rights Termination Cases.* In an appeal or an original proceeding in an appellate court, arising out of a case in which the termination of parental rights was at issue:

(1) except for a docketing statement, in all papers submitted to the court, including all appendix items submitted with a brief, petition, or motion:

(A) a minor must be identified only by an alias unless the court orders otherwise;

(B) the court may order that a minor's parent or other family member be identified only by an alias if necessary to protect a minor's identity; and

(C) all documents must be redacted accordingly;

(2) the court must, in its opinion, use an alias to refer to a minor, and if necessary to protect the minor's identity, to the minor's parent or other family member.

(c) *Juvenile Court Cases.* In an appeal or an original proceeding in an appellate court, arising out of a case under Title 3 of the Family Code:

(1) except for a docketing statement, in all papers submitted to the court, including all appendix items submitted with a brief, petition, or motion:

(A) a minor must be identified only by an alias;

(B) a minor's parent or other family member must be identified only by an alias; and

(C) all documents must be redacted accordingly;

(2) the court must, in its opinion, use an alias to refer to a minor and to the minor's parent or other family member.

(d) *No Alteration of Appellate Record.* Nothing in this rule permits alteration of the original appellate record except as specifically authorized by court order.

Comment to 2008 change: Subdivision 9.3 is amended to reduce the number of copies of a motion for extension of time or response filed in the Supreme Court. Subdivision 9.8 is new. To protect the privacy of minors in suits affecting the parent-child relationship (SAPCR), including suits to terminate parental rights, Section 109.022(d) of the Family Code authorizes appellate courts, in their opinions, to identify parties only by fictitious names or by initials. Similarly, Section 56.01(j) of the Family Code prohibits identification of a minor or a minor's family in an appellate opinion related to juvenile court proceedings. But as appellate briefing becomes more widely available through electronic media sources, appellate courts' efforts to protect minors' privacy by disguising their identities in appellate opinions may be defeated if the same children are fully identified in briefs and other court papers available to the public. The rule provides protection from such disclosures. Any fictitious name should not be pejorative or suggest the person's true identity. The rule does not limit an appellate court's authority to disguise parties' identities in appropriate circumstances in other cases. Although appellate courts are authorized to enforce the rule's provisions requiring redaction, parties and amici curiae are responsible for ensuring that briefs and other papers submitted to the court fully comply with the rule.

Rule 10. Motions in the Appellate Courts

10.1 Contents of Motions; Response

(a) *Motion.* Unless these rules prescribe another form, a party must apply by motion for an order or other relief. The motion must:

* * *

(5) in civil cases, except for motions for rehearing and en banc reconsideration, contain or be accompanied by a certificate stating that the filing party conferred, or made a reasonable attempt to confer, with all other parties about the merits of the motion and whether those parties oppose the motion.

10.2 Evidence on Motions. A motion need not be verified unless it depends on the following types of facts, in which case the motion must be supported by affidavit or other satisfactory evidence. The types of facts requiring proof are those that are:

(a) not in the record;

(b) not within the court's knowledge in its official capacity; and

(c) not within the personal knowledge of the attorney signing the motion.

10.5 Particular Motions

* * *

(b) *Motions to Extend Time.*

* * *

(2) Contents of Motion to Extend Time to File Notice of Appeal. A motion to extend the time for filing a notice of appeal must:

(A) comply with (1)(A) and (C);

(B) identify the trial court;

(C) state the date of the trial court's judgment or appealable order; and

(D) state the case number and style of the case in the trial court.

(3) Contents of Motion to Extend Time to File Petition for Review or Petition for Discretionary Review. A motion to extend time to file a petition for review or petition for discretionary review must also specify:

(A) the court of appeals;

(B) the date of the court of appeals' judgment;

(C) the case number and style of the case in the court of appeals; and

(D) the date every motion for rehearing or en banc reconsideration was filed, and either the date and nature of the court of appeals' ruling on the motion, or that it remains pending.

Comment to 2008 change: It happens so infrequently that a nonmovant does not oppose a motion for rehearing or en banc reconsideration that such motions are excepted from the certificate-of-conference requirement in Subdivision 10.1(a)(5). Subdivision 10.2 is revised to clarify that facts supporting a motion need not be verified by the filer if supporting evidence is in the record, the facts are known to the court, or the filer has personal knowledge of them. Subdivision 10.5(b)(3)(D) is added.

Rule 19. Plenary Power of the Courts of Appeals and Expiration of Term

19.1 Plenary Power of Courts of Appeals. A court of appeals' plenary power over its judgment expires:

(a) 60 days after judgment if no timely filed motion for rehearing or en banc reconsideration, or timely filed motion to extend time to file such a motion, is then pending; or

(b) 30 days after the court overrules all timely filed motions for rehearing or en banc reconsideration, and all timely filed motions to extend time to file such a motion.

Comment to 2008 change: Subdivision 19.1 is changed, consistent with other changes in the rules, to specifically address a motion for en banc reconsideration and treat it as a motion for rehearing.

Rule 20. When Party Is Indigent

20.1 Civil Cases

(a) *Establishing Indigence.*

(1) By Certificate. If the appellant proceeded in the trial court without advance payment of costs pursuant to a certificate under Texas Rule of

Civil Procedure 145(c) confirming that the appellant was screened for eligibility to receive free legal services under income guidelines used by a program funded by Interest on Lawyers Trust Accounts or the Texas Access to Justice Foundation, an additional certificate may be filed in the appellate court confirming that the appellant was rescreened after rendition of the trial court's judgment and again found eligible under program guidelines. A party's affidavit of inability accompanied by the certificate may not be contested.

(2) By Affidavit. A party who cannot pay the costs in an appellate court may proceed without advance payment of costs if:

(A) the party files an affidavit of indigence in compliance with this rule;

(B) the claim of indigence is not contestable, is not contested, or, if contested, the contest is not sustained by written order; and

(C) the party timely files a notice of appeal.

(b) *Contents of Affidavit.* The affidavit of indigence must identify the party filing the affidavit and must state what amount of costs, if any, the party can pay. The affidavit must also contain complete information about:

* * *

(10) whether an attorney is providing free legal services to the party without a contingent fee;

(11) whether an attorney has agreed to pay or advance court costs; and

(12) if applicable, the party's lack of the skill and access to equipment necessary to prepare the appendix, as required by Rule 38.5(d).

(c) *When and Where Affidavit Filed.*

(1) Appeals. An appellant must file the affidavit of indigence in the trial court with or before the notice of appeal. The prior filing of an affidavit of indigence in the trial court pursuant to Texas Rule of Civil Procedure 145 does not meet the requirements of this rule, which requires a separate affidavit and proof of current indigence. An appellee who is required to pay part of the cost of preparation of the record under Rule 34.5(b)(3) or 34.6(c)(3) must file an affidavit of indigence in the trial court within 15 days after the date when the appellee becomes responsible for paying that cost.

* * *

(3) Extension of Time. The appellate court may extend the time to file an affidavit of indigence if, within 15 days after the deadline for filing the affidavit, the party files in the appellate court a motion complying with Rule 10.5(b). But the court may not dismiss the appeal or affirm the trial court's judgment on the ground that the appellant has failed to file an affidavit or a sufficient affidavit of indigence unless the court has first provided the appellant notice of the deficiency and a reasonable time to remedy it.

(d) *Duty of Clerk.*

(1) Trial Court Clerk. If the affidavit of indigence is filed with the trial court clerk under (c)(1), the clerk must promptly send a copy of the affidavit to the appropriate court reporter.

(2) Appellate Court Clerk. If the affidavit of indigence is filed with the appellate court clerk and if the filing party is requesting the preparation of a record, the appellate court clerk must:

(A) send a copy of the affidavit to the trial court clerk and the appropriate court reporter; and

(B) send to the trial court clerk, the court reporter, and all parties, a notice stating the deadline for filing a contest to the affidavit of indigence.

(e) *Contest to Affidavit.* The clerk, the court reporter, the court recorder, or any party may challenge an affidavit that is not accompanied by a TAJF certificate by filing--in the court in which the affidavit was filed--a contest to the affidavit. The contest must be filed on or before the date set by the clerk if the affidavit was filed in the appellate court, or within 10 days after the date when the affidavit was filed if the affidavit was filed in the trial court. The contest need not be sworn.

Comment to 2008 change: Subdivision 20.1(a) is added to provide, as in Texas Rule of Civil Procedure 145, that an affidavit of indigence accompanied by an IOLTA or other Texas Access to Justice Foundation certificate cannot be challenged. Subdivision 20.1(c)(1) is revised to clarify that an affidavit of indigence filed to proceed in the trial court without advance payment of costs is insufficient to establish indigence on appeal; a separate affidavit must be filed with or before the notice of appeal. Subdivision 20.1(c)(3) is revised to provide that an appellate court must give an appellant who fails to file a proper appellate indigence affidavit notice of the defect and an opportunity to cure it before dismissing the appeal or affirming the judgment on that basis. *See Higgins v. Randall County Sheriff's Office,* 193 S.W.3d 898 (Tex. 2006). The limiting phrase "under (c)(2)" in Subdivision 20.1(d)(2) is deleted to clarify that the appellate clerk's duty to forward copies of the affidavit to the trial court clerk and the court reporter, along with a notice setting a deadline to contest the affidavit, applies to affidavits on appeal erroneously filed in the appellate court, not only to affidavits in other appellate proceedings properly filed in the appellate court under subdivision 20.1(c)(2). Although Subdivision 3.1(g) defines "court reporter" to include court recorder, subdivision 20.1(e) is amended to make clear that a court recorder can contest an affidavit.

Rule 24. Suspension of Enforcement of Judgment Pending Appeal in Civil Cases

24.2 Amount of Bond, Deposit, or Security

* * *

(c) *Determination of Net Worth.*

(1) Judgment Debtor's Affidavit Required; Contents; Prima Facie Evidence. A judgment debtor who provides a bond, deposit, or security under (a)(1)(A) in an amount based on the debtor's net worth must simultaneously file with the trial court clerk an affidavit that states the debtor's net worth and states complete, detailed information concerning the debtor's assets and liabilities from which net worth can be ascertained. An affidavit that meets these requirements is prima facie evidence of the debtor's net worth for the purpose of establishing the amount of the bond, deposit, or security required to suspend enforcement of the judgment. A trial court clerk must receive and file a net-worth affidavit tendered for filing by a judgment debtor.

(2) Contest; Discovery. A judgment creditor may file a contest to the debtor's claimed net worth. The contest need not be sworn. The creditor may conduct reasonable discovery concerning the judgment debtor's net worth.

(3) Hearing; Burden of Proof; Findings; Additional Security. The trial court must hear a judgment creditor's contest of the judgment debtor's claimed net worth promptly after any discovery has been completed. The judgment debtor has the burden of proving net worth. The trial court must issue an order that states the debtor's net worth and states with particularity the factual basis for that determination. If the trial court orders additional or other security to supersede the judgment, the enforcement of the judgment will be suspended for twenty days after the trial court's order. If the judgment debtor does not comply with the order within that period, the judgment may be enforced against the judgment debtor.

24.4 Appellate Review

(a) *Motions; Review.* A party may seek review of the trial court's ruling by motion filed in the court of appeals with jurisdiction or potential jurisdiction over the appeal from the judgment in the case. A party may seek review of the court of appeals' ruling on the motion by petition for writ of mandamus in the Supreme Court. The appellate court may review:

(1) the sufficiency or excessiveness of the amount of security, but when the judgment is for money, the appellate court must not modify the amount of security to exceed the limits imposed by Rule 24.2(a)(1);

(2) the sureties on any bond;

(3) the type of security;

(4) the determination whether to permit suspension of enforcement; and

(5) the trial court's exercise of discretion under Rule 24.3(a).

* * *

Comment to 2008 change: Subdivision 24.2(c) is amended to clarify the procedure in determining net worth. A debtor's affidavit of net worth must be detailed, but the clerk must file what is tendered without determining whether it complies with the rule. If the trial court orders that additional or other security be given, the debtor is afforded time to comply. Subdivision 24.4(a) is revised to clarify that a party seeking relief from a supersedeas ruling should file a motion in the court of appeals that has or presumably will have jurisdiction of the appeal. After the court of appeals has ruled, a party may seek review by filing a petition for writ of mandamus in the Supreme Court. *See In re Smith / In re Main Place Custom Homes, Inc.,* 192 S.W.3d 564, 568 (Tex. 2006) (per curiam).

Rule 25. Perfecting Appeal

25.2. Criminal Cases

* * *

(b) *Perfection of Appeal.* In a criminal case, appeal is perfected by timely filing a sufficient notice of appeal. In a death-penalty case it is unnecessary to file a notice of appeal, but, in every death-penalty case, the clerk of the trial court shall file a notice of conviction with the Court of Criminal Appeals within thirty days after the defendant is sentenced to death.

Rule 26. Time to Perfect Appeal

26.2. Criminal Cases

* * *

(b) *By the State.* The notice of appeal must be filed within 20 days after the day the trial court enters the order, ruling, or sentence to be appealed.

Rule 28. Accelerated and Agreed Interlocutory Appeals in Civil Cases

28.1 Accelerated Appeals

(a) *Types of Accelerated Appeals.* Appeals from interlocutory orders (when allowed as of right by statute), appeals in quo warranto proceedings, appeals required by statute to be accelerated or expedited, and appeals required by law to be filed or perfected within less than 30 days after the date of the order or judgment being appealed are accelerated appeals.

(b) *Perfection of Accelerated Appeal.* Unless otherwise provided by statute, an accelerated appeal is perfected by filing a notice of appeal in compliance with Rule 25.1 within the time allowed by Rule 26.1(b) or as extended by Rule 26.3. Filing a motion for new trial, any other post-trial motion, or a request for findings of fact will not extend the time to perfect an accelerated appeal.

(c) *Appeals of Interlocutory Orders.* The trial court need not file findings of fact and conclusions of law but may do so within 30 days after the order is signed.

(d) *Quo Warranto Appeals.* The trial court may grant a motion for new trial timely filed under Texas Rule of Civil Procedure Rule 329b(a)-(b) until 50 days after the trial court's final judgment is signed. If not determined by signed written order within that period, the motion will be deemed overruled by operation of law on expiration of that period.

(e) *Record and Briefs.* In lieu of the clerk's record, the appellate court may hear an accelerated appeal on the original papers forwarded by the trial court or on sworn and uncontroverted copies of those papers. The appellate court may allow the case to be submitted without briefs. The deadlines and procedures for filing the record and briefs in an accelerated appeal are provided in Rules 35.1 and 38.6.

28.2 Agreed Interlocutory Appeals in Civil Cases

(a) *Perfecting Appeal.* An agreed appeal of an interlocutory order permitted by statute must be perfected as provided in Rule 25.1. The notice of appeal must be filed no later than the 20th day after the date the trial court signs a written order granting permission to appeal, unless the court of appeals extends the time for filing pursuant to Rule 26.3.

(b) *Other Requirements.* In addition to perfecting appeal, the appellant must file with the clerk of the appellate court a docketing statement as provided in Rule 32.1 and pay to the clerk of the appellate court all required fees authorized to be collected by the clerk.

(c) *Contents of Notice.* The notice of accelerated appeal must contain, in addition to the items required by Rule 25.1(d), the following:

(1) a list of the names of all parties to the trial court proceeding and the names, addresses, and telefax numbers of all trial and appellate counsel;

(2) a copy of the trial court's order granting permission to appeal;

(3) a copy of the trial court order appealed from;

(4) a statement that all parties to the trial court proceeding agreed to the trial court's order granting permission to appeal;

(5) a statement that all parties to the trial court proceeding agreed that the order granting permission to appeal involves a controlling question of law as to which there is a substantial ground for difference of opinion;

(6) a brief statement of the issues or points presented; and

(7) a concise explanation of how an immediate appeal may materially advance the ultimate termination of the litigation.

(d) *Determination of Jurisdiction.* If the court of appeals determines that a notice of appeal filed under this rule does not demonstrate the court's jurisdiction, it may order the appellant to file an amended notice of appeal. On a party's motion or its own initiative, the court of appeals may also order the appellant or any other party to file briefing addressing whether the appeal meets the statutory requirements, and may direct the parties to file supporting evidence. If, after providing an opportunity to file an amended notice of appeal or briefing addressing potential jurisdictional defects, the court of appeals concludes that a jurisdictional defect exists, it may dismiss the appeal for want of jurisdiction at any stage of the appeal.

(e) *Record; Briefs.* The rules governing the filing of the appellate record and briefs in accelerated appeals apply. A party may address

in its brief any issues related to the court of appeals' jurisdiction, including whether the appeal meets the statutory requirements.

(f) *No Automatic Stay of Proceedings in Trial Court.* An agreed appeal of an interlocutory order permitted by statute does not stay proceedings in the trial court except as agreed by the parties and ordered by the trial court or the court of appeals.

Comment to 2008 change: Rule 28 is rewritten. Subdivision 28.1 more clearly defines accelerated appeals and provides a uniform appellate timetable. But many statutes that provide for accelerated or expedited appeals also set appellate timetables, and statutory deadlines govern over deadlines provided in the rule. Subdivision 28.2 provides procedures for an agreed appeal of an interlocutory order permitted by statute. Such appeals are now permitted under Section 51.014(d) of the Civil Practice and Remedies Code. The requirements for perfecting appeal are generally set out in Rule 25.1, and as provided there, only the notice of appeal is jurisdictional.

Rule 29. Orders Pending Interlocutory Appeal in Civil Cases

29.5. Further Proceedings in Trial Court. While an appeal from an interlocutory order is pending, the trial court retains jurisdiction of the case and unless prohibited by statute may make further orders, including one dissolving the order complained of on appeal. If permitted by law, the trial court may proceed with a trial on the merits. But the court must not make an order that:

(a) is inconsistent with any appellate court temporary order; or

(b) interferes with or impairs the jurisdiction of the appellate court or effectiveness of any relief sought or that may be granted on appeal.

Comment to 2008 change: Rule 29.5 is amended to be consistent with Section 51.014(b) of the Civil Practice and Remedies Code, as amended in 2003, staying all proceedings in the trial court pending resolution of interlocutory appeals of class certification orders, denials of summary judgments based on assertions of immunity by governmental officers or employees, and orders granting or denying a governmental unit's plea to the jurisdiction.

Rule 38. Requisites of Briefs

38.1 Appellant's Brief. The appellant's brief must, under appropriate headings and in the order here indicated, contain the following:

(a) *Identity of Parties and Counsel.* The brief must give a complete list of all parties to the trial court's judgment or order appealed from, and the names and addresses of all trial and appellate counsel, except as otherwise provided in Rule 9.8.

* * *

(e) *Any Statement Regarding Oral Argument.* The brief may include a statement explaining why oral argument should or should not be permitted. Any such statement must not exceed one page and should address how the court's decisional process would, or would not, be aided by oral argument. As required by Rule 39.7, any party requesting oral argument must note that request on the front cover of the party's brief.

(f) *Issues Presented.* [no change to rule text]

(g) *Statement of Facts.* [no change to rule text]

(h) *Summary of the Argument.* [no change to rule text]

(i) *Argument.* [no change to rule text]

(j) *Prayer.* [no change to rule text]

(k) *Appendix in Civil Cases.* [no change to rule text]

Comment to 2008 change: A party may choose to include a statement in the brief regarding oral argument.

38.4 Length of Briefs. An appellant's brief or appellee's brief must be no longer than 50 pages, exclusive of the pages containing the identity of parties and counsel, any statement regarding oral argument, the table of contents, the index of authorities, the statement of the case, the issues presented, the signature, the proof of service, and the appendix. A reply brief must be no longer than 25 pages, exclusive of the items stated above. But in a civil case, the aggregate number of pages of all briefs filed by a party must not exceed 90, exclusive of the items stated above. The court may, on motion, permit a longer brief.

Comment to 2008 changes: The optional statement regarding oral argument does not count toward the briefing page limit.

Rule 39. Oral Argument; Decision Without Argument

39.1 Right to Oral Argument. A party who has filed a brief and who has timely requested oral argument may argue the case to the court unless the court, after examining the briefs, decides that oral argument is unnecessary for any of the following reasons:

(a) the appeal is frivolous;

(b) the dispositive issue or issues have been authoritatively decided;

(c) the facts and legal arguments are adequately presented in the briefs and record; or

(d) the decisional process would not be significantly aided by oral argument.

39.8 Cases Advanced Without Oral Argument. [deleted]

39.8 Clerk's Notice. [former 39.9, renumbered, no change to rule text]

Comment to 2008 change: Subdivision 39.1 is amended to provide for oral argument unless the court determines it is unnecessary and to set out the reasons why argument may be unnecessary. The appellate court must evaluate these reasons in view of the traditional importance of oral argument. The court need not agree on, and generally should not announce, a specific reason or reasons for declining oral argument.

Rule 41. Panel and En Banc Decision

41.1 Decision by Panel

* * *

(b) *When Panel Cannot Agree on Judgment.* After argument, if for any reason a member of the panel cannot participate in deciding a case, the case may be decided by the two remaining justices. If they cannot agree on a judgment, the chief justice of the court of appeals must:

(1) designate another justice of the court to sit on the panel to consider the case;

(2) request the Chief Justice of the Supreme Court to temporarily assign an eligible justice or judge to sit on the panel to consider the case; or

(3) convene the court en banc to consider the case.

The reconstituted panel or the en banc court may order the case reargued.

(c) *When Court Cannot Agree on Judgment.* After argument, if for any reason a member of a court consisting of only three justices cannot participate in deciding a case, the case may be decided by the two remaining justices. If they cannot agree on a judgment, that fact must be certified to the Chief Justice of the Supreme Court. The Chief Justice may then temporarily assign an eligible justice or judge to sit with the court of appeals to consider the case. The reconstituted court may order the case reargued.

41.2 Decision by En Banc Court

* * *

(b) *When En Banc Court Cannot Agree on Judgment.* If a majority of an en banc court cannot agree on a judgment, that fact must be certified to the Chief Justice of the Supreme Court. The Chief Justice may then temporarily assign an eligible justice or judge to sit with the court of appeals to consider the case. The reconstituted court may order the case reargued.

* * *

41.3 Precedent in Transferred Cases. In cases transferred by the Supreme Court from one court of appeals to another, the court of appeals to which the case is transferred must decide the case in accordance with the precedent of the transferor court under principles of stare decisis if the transferee court's decision otherwise would have been inconsistent with the precedent of the transferor court. The court's opinion may state whether the outcome would have been different had the transferee court not been required to decide the case in accordance with the transferor court's precedent.

Comment to 2008 change: Subdivisions 41.1 and 41.2 are amended to acknowledge the full authority of the Chief Justice of the Supreme Court to temporarily assign a justice or judge to hear a matter pending in an appellate court. The statutory provisions governing the assignment of judges to appellate courts are located in Chapters 74 and 75 of the Government Code. Other minor changes are made for consistency. Subdivision 41.3 is added to require, in appellate cases transferred by the Supreme Court under Section 73.001 of the Government Code for docket equalization or other purposes, that the transferee court must generally resolve any conflict between the precedent of the transferor court and the precedent of the transferee court -- or that of any other intermediate appellate court the transferee court otherwise would have followed -- by following the precedent of the transferor court, unless it appears that the transferor court itself would not be bound by that precedent. The rule requires the transferee court to "stand in the shoes" of the transferor court so that an appellate transfer will not produce a different outcome, based on application of substantive law, than would have resulted had the case not been transferred. The transferee court is not expected to follow the transferor court's local rules or otherwise supplant its own local procedures with those of the transferor court.

Rule 47. Opinions, Publication, and Citation

47.2 Designation and Signing of Opinions; Participating Justices.

(a) *Civil and Criminal Cases.* Each opinion of the court must be designated either an "Opinion" or a "Memorandum Opinion." A majority of the justices who participate in considering the case must determine whether the opinion will be signed by a justice or will be per curiam and whether it will be designated an opinion or memorandum opinion. The names of the participating justices must be noted on all written opinions or orders of the court or a panel of the court.

(b) *Criminal Cases.* In addition, each opinion and memorandum opinion in a criminal case must bear the notation "publish" or "do not publish" as determined -- before the opinion is handed down -- by a majority of the justices who participate in considering the case. Any party may move the appellate court to change the notation, but the court of appeals must not change the notation after the Court of Criminal Appeals has acted on any party's petition for discretionary review or other request for relief. The Court of Criminal Appeals may, at any time, order that a "do not publish" notation be changed to "publish."

(c) *Civil Cases.* Opinions and memorandum opinions in civil cases issued on or after January 1, 2003 shall not be designated "do not publish."

47.7 Citation of Unpublished Opinions.

(a) *Criminal Cases.* Opinions and memorandum opinions not designated for publication by the court of appeals under these or prior rules have no precedential value but may be cited with the notation, "(not designated for publication)."

(b) *Civil Cases.* Opinions and memorandum opinions designated "do not publish" under these rules by the courts of appeals prior to January 1, 2003 have no precedential value but may be cited with the notation, "(not designated for publication)." If an opinion or memorandum opinion issued on or after that date is erroneously designated "do not publish," the erroneous designation will not affect the precedential value of the decision.

Comment to 2008 change: Effective January 1, 2003, Rule 47 was amended to prospectively discontinue designating opinions in civil cases as either "published" or "unpublished." Subdivision 47.7 is revised to clarify that, with respect to civil cases, only opinions issued prior to the 2003 amendment and affirmatively designated "do not publish" should be considered "unpublished" cases lacking precedential value. All opinions and memorandum opinions in civil cases issued after the 2003 amendment have precedential value. The provisions governing citation of unpublished opinions in criminal cases are substantively unchanged. Subdivisions 47.2 and 47.7 are amended to clarify that memorandum opinions are subject to those rules.

Rule 49. Motion for Rehearing and En Banc Reconsideration

49.5 Further Motion for Rehearing. After a motion for rehearing is decided, a further motion for rehearing may be filed within 15 days of the court's action if the court:

(a) modifies its judgment;

(b) vacates its judgment and renders a new judgment; or

(c) issues a different opinion.

49.6 Amendments. A motion for rehearing or en banc reconsideration may be amended as a matter of right anytime before the 15-day period allowed for filing the motion expires, and with leave of the court, anytime before the court of appeals decides the motion.

49.7 En Banc Reconsideration. A party may file a motion for en banc reconsideration as a separate motion, with or without filing a motion for rehearing. The motion must be filed within 15 days after the court of appeals' judgment or order, or when permitted, within 15 days after the court of appeals' denial of the party's last timely filed motion for rehearing or en banc consideration. While the court has plenary power, a majority of the en banc court may, with or without a motion, order en banc reconsideration of a panel's decision. If a majority orders reconsideration, the panel's judgment or order does not become final, and the case will be resubmitted to the court for en banc review and disposition.

49. 8 Extension of Time. A court of appeals may extend the time for filing a motion for rehearing or en banc reconsideration if a party files a motion complying with Rule 10.5(b) no later than 15 days after the last date for filing the motion.

* * *

49.11 Relationship to Petition for Review. A party may not file a motion for rehearing or en banc reconsideration in the court of appeals after that party has filed a petition for review in the Supreme Court unless the court of appeals modifies its opinion or judgment after the petition for review is filed. The filing of a petition for review does not preclude another party from filing a motion for rehearing or en banc reconsideration or preclude the court of appeals from ruling on the motion. If a motion for rehearing or en banc reconsideration is timely

filed after a petition for review is filed, the petitioner must immediately notify the Supreme Court clerk of the filing of the motion, and must notify the clerk when the last timely filed motion is overruled by the court of appeals.

49.12 Certificate of Conference Not Required. A certificate of conference is not required for a motion for rehearing or en banc reconsideration of a panel's decision.

Comment to 2008 change: Rule 49 is revised to treat a motion for en banc reconsideration as a motion for rehearing and to include procedures governing the filing of a motion for en banc reconsideration. Subdivision 49.5(c) is amended to clarify that a further motion for rehearing may be filed if the court issues a different opinion, irrespective of whether the opinion is issued in connection with the overruling of a prior motion for rehearing. Issuance of a new opinion that is not substantially different should not occasion a further motion for rehearing, but a motion's lack of merit does not affect appellate deadlines. The provisions of former Rule 53.7(b) that address motions for rehearing are moved to new subdivision 49.11 without change, leaving the provisions of Rule 53.7(b) that address petitions for review undisturbed. Subdivision 49.12 mirrors Rule 10.1(a)(5) in excepting motions for rehearing and motions for en banc reconsideration from the certificate-of-conference requirement.

Rule 50. Reconsideration on Petition for Discretionary Review

Within 60 days after a petition for discretionary review is filed with the clerk of the court of appeals that delivered the decision, the justices who participated in the decision may, as provided by subsection (a), reconsider and correct or modify the court's opinion or judgment. Within the same period of time, any of the justices who participated in the decision may issue a concurring or dissenting opinion.

(a) If the court's original opinion or judgment is corrected or modified, that opinion or judgment is withdrawn and the modified or corrected opinion or judgment is substituted as the opinion or judgment of the court. No further opinions may be issued by the court of appeals. The original petition for discretionary review is not dismissed by operation of law, unless the filing party files a new petition in the court of appeals. In the alternative, the petitioning party shall submit to the court of appeals copies of the corrected or modified opinion or judgment as an amendment to the original petition.

(b) Any party may then file with the court of appeals a new petition for discretionary review seeking review of the corrected or modified opinion or judgment, including any dissents or concurrences, under Rule 68.2.

Rule 52. Original Proceedings

52.3 Form and Contents of Petition. The petition must, under appropriate headings and in the order here indicated, contain the following:

* * *

(d) *Statement of the Case.* The petition must contain a statement of the case that should seldom exceed one page and should not discuss the facts. The statement must contain the following:

* * *

(5) if the petition is filed in the Supreme Court after a petition requesting the same relief was filed in the court of appeals:

* * *

(D) the citation of the court's opinion;

* * *

(g) *Statement of Facts.* The petition must state concisely and without argument the facts pertinent to the issues or points presented. Every statement of fact in the petition must be supported by citation to competent evidence included in the appendix or record.

* * *

(j) *Certification.* The person filing the petition must certify that he or she has reviewed the petition and concluded that every factual statement in the petition is supported by competent evidence included in the appendix or record.

(k) *Appendix.* [52.3(j) redesignated as (k), no change to rule text]

52.6 Length of Petition, Response, and Reply. Excluding those pages containing the identity of parties and counsel, the table of contents, the index of authorities, the statement of the case, the statement of jurisdiction, the issues presented, the signature, the proof of service, the certification, and the appendix, the petition and response must not exceed 50 pages each if filed in the court of appeals, or 15 pages each if filed in the Supreme Court. A reply may be no longer than 25 pages if filed in the court of appeals or 8 pages if filed in the Supreme Court, exclusive of the items stated above. The court may, on motion, permit a longer petition, response, or reply.

Comment to 2008 change: The reference to "unpublished" opinions in Subdivision 52.3(d)(5)(D) is deleted. The filer should provide the best cite available for the court of appeals' opinion, which may be a LEXIS, Westlaw, or other citation to an electronic medium. Subdivision 52.3 is further amended to delete the requirement that all factual statements be verified by affidavit. Instead, the filer -- in the usual case of a party with legal representation, the lead counsel -- must include a statement certifying that all factual statements are supported by competent evidence in the appendix or record to which the petition has cited. The certification required by subdivision 52.3(j) does not count against the page limitations.

Rule 53. Petition for Review

53.2 Contents of Petition

* * *

(d) *Statement of the Case.* The petition must contain a statement of the case that should seldom exceed one page and should not discuss the facts. The statement must contain the following:

* * *

(8) the citation for the court of appeals' opinion; and

(9) the disposition of the case by the court of appeals, including the disposition of any motions for rehearing or en banc reconsideration, and whether any motions for rehearing or en banc reconsideration are pending in the court of appeals at the time the petition for review is filed.

53.7 Time and Place of Filing

(a) *Petition.* Unless the Supreme Court orders an earlier filing deadline, the petition must be filed with the Supreme Court clerk within 45 days after the following:

(1) the date the court of appeals rendered judgment, if no motion for rehearing or en banc reconsideration is timely filed; or

(2) the date of the court of appeals' last ruling on all timely filed motions for rehearing or en banc reconsideration.

(b) *Premature Filing.* A petition filed before the last ruling on all timely filed motions for rehearing and en banc reconsideration is treated as having been filed on the date of, but after, the last ruling on any such motion. If a party files a petition for review while a motion for rehear-

ing or en banc reconsideration is pending in the court of appeals, the party must include that information in its petition for review.

Comment to 2008 change: Subdivision 53.7(a) is amended to clarify that the Supreme Court may shorten the time for filing a petition for review and that the timely filing of a motion for en banc reconsideration tolls the commencement of the 45-day period for filing a petition for review until the motion is overruled. Subdivision 53.2(d)(8) is amended to delete the reference to unpublished opinions in civil cases. Subdivision 53.2(d)(9) is amended to require a party that prematurely files a petition for review to notify the Supreme Court of any panel rehearing or en banc reconsideration motions still pending in the court of appeals. Subdivision 53.7(b) is revised to reference this new requirement and to relocate to new Rule 49.11 those provisions governing motions for rehearing.

Rule 64. Motion for Rehearing

64.4 Second Motion. The Court will not consider a second motion for rehearing unless the Court modifies its judgment, vacates its judgment and renders a new judgment, or issues a different opinion.

Comment to 2008 change: Subdivision 64.4 is amended to reflect the Court's practice of considering a second motion for rehearing after modifying its judgment or opinion in response to a prior motion for rehearing. When the Court modifies its opinion without modifying its judgment, the Court will ordinarily deny a second motion for rehearing unless the new opinion is substantially different from the original opinion.

Rule 68. Discretionary Review With Petition

68.7 Court of Appeals Clerk's Duties

* * *

(b) *Reply.* The opposing party has 30 days after the timely filing of the petition in the court of appeals to file a reply to the petition with the clerk of the court of appeals. Upon receiving a reply to the petition, the clerk for the court of appeals must file the reply and note the filing on the docket.

(c) *Sending Petition and Reply to Court of Criminal Appeals.* Unless a petition for discretionary review is dismissed under Rule 50, the clerk of the court of appeals must, within 60 days after the petition is filed, send to the clerk of the Court of Criminal Appeals the petition and any copies furnished by counsel, the reply, if any, and any copies furnished by counsel, together with the record, copies of the motions filed in the case, and copies of any judgments, opinions, and orders of the court of appeals. The clerk need not forward any nondocumentary exhibits unless ordered to do so by the Court of Criminal Appeals.

68.9 Reply [deleted]

Rule 70. Brief on the Merits

70.3 Brief Contents and Form. Briefs must comply with the requirements of Rule 38, except that they need not contain the appendix (Rule 38.1(k)). Copies must be served as required by Rule 68.11.

Rule 71. Direct Appeals

71.3 Briefs. Briefs in a direct appeal should be prepared and filed in accordance with Rule 38, except that the brief need not contain an appendix (Rule 38.1(k)), and the brief in a case in which the death penalty has been assessed may not exceed 125 pages. All briefs must be filed in the Court of Criminal Appeals. The brief must include a short statement of why oral argument would be helpful, or a statement that oral argument is waived.

TRD-200804736

Kennon L. Peterson
Rules Attorney
Supreme Court of Texas
Filed: September 3, 2008

♦ ♦ ♦

Order Adopting Amendments to Article I of State Bar Rules

Misc. Docket No. 08-9117

ORDERED that:

1. The Court hereby adopts the following amendments to Article I of the State Bar Rules, which the State Bar Board of Directors approved in substantially similar form on January 25, 2008.

2. By Order dated May 14, 2008, in Misc. Docket No. 08-9048, the Supreme Court of Texas proposed amendments to Articles I and III of the State Bar Rules and invited public comment. This Order contains the final version of amended Article I. The Court is still considering Article III.

3. Amended Article I of the State Bar Rules takes effect on September 1, 2008.

4. The Clerk is directed to:

a. file a copy of this Order with the Secretary of State;

b. cause a copy of this Order to be mailed to each registered member of the State Bar of Texas by publication in the *Texas Bar Journal;*

c. send a copy of this Order to each elected member of the Legislature; and

d. cause a copy of this Order to be posted on the website of the Supreme Court of Texas at http://www.supreme.courts.state.tx.us.

In Chambers, this 20th day of August, 2008.

_____

Wallace B. Jefferson, Chief Justice

_____

Nathan L. Hecht, Justice

_____

Harriet O'Neill, Justice

_____

J. Dale Wainwright, Justice

_____

Scott Brister, Justice

_____

David M. Medina, Justice

_____

Paul W. Green, Justice

_____

Phil Johnson, Justice

_____

Don R. Willett, Justice

ARTICLE I -- DEFINITIONS

7. "Registered Address" is the address of a member as shown on the membership rolls maintained by the State Bar on behalf of the clerk of the Supreme Court. A member's registered address will be used for receiving official notices from the State Bar, including membership compliance information, member benefits, and disciplinary matters.

TRD-200804739
Kennon L. Peterson
Rules Attorney
Supreme Court of Texas
Filed: September 3, 2008

♦ ♦ ♦

Order Adopting Amendments to Texas Rule of Disciplinary Procedure 1.06

Misc. Docket No. 08-9116

ORDERED that:

1. The Court hereby adopts the following amendments to Texas Rule of Disciplinary Procedure 1.06, which the State Bar Board of Directors approved in substantially similar form on April 25, 2008.

2. By Order dated May 14, 2008, in Misc. Docket No. 08-9047, the Supreme Court of Texas proposed amendments to Texas Rule of Disciplinary Procedure 1.06 and invited public comment. The Court then made additional revisions to the rule. This Order contains the final version of the amended rule.

3. Amended Texas Rule of Disciplinary Procedure 1.06 takes effect on September 1, 2008.

4. The Clerk is directed to:

a. file a copy of this Order with the Secretary of State;

b. cause a copy of this Order to be mailed to each registered member of the State Bar of Texas by publication in the *Texas Bar Journal;*

c. send a copy of this Order to each elected member of the Legislature; and

d. cause a copy of this Order to be posted on the website of the Supreme Court of Texas at http://www.supreme.courts.state.tx.us.

In Chambers, this 20th day of August 2008.

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Wallace B. Jefferson, Chief Justice

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Nathan L. Hecht, Justice

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Harriet O'Neill, Justice

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J. Dale Wainwright, Justice

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Scott Brister, Justice

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David M. Medina, Justice

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Paul W. Green, Justice

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Phil Johnson, Justice

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Don R. Willett, Justice

TEXAS RULES OF DISCIPLINARY PROCEDURE

1.06 Definitions

A. "Address" means the registered address provided by the attorney who is the subject of the Grievance, as that address is shown on the membership rolls maintained by the State Bar on behalf of the Clerk of the Supreme Court at the time of receipt of the Grievance by the Chief Disciplinary Counsel.

TRD-200804738
Kennon L. Peterson
Rules Attorney
Supreme Court of Texas
Filed: September 3, 2008

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Order Promulgating Rule of Judicial Administration 15

Misc. Docket No. 08-9118

ORDERED that:

1. Pursuant to article V, section 31(a) of the Texas Constitution and Section 74.024 of the Texas Government Code, the Texas Rules of Judicial Administration are amended by adding Rule 15 regarding appeals from trial courts in counties assigned to multiple appellate districts, as follows.

2. By Order dated March 10, 2008, in Misc. Docket No. 08-9004, the Supreme Court proposed Texas Rule of Judicial Administration 15 and invited public comment, after which the Court made additional revisions to the rule.

3. Texas Rule of Judicial Administration 15 takes effect on September 1, 2008.

4. The Clerk is directed to:

a. file a copy of this Order with the Secretary of State;

b. cause a copy of this Order to be mailed to each registered member of the State Bar of Texas by publication in the *Texas Bar Journal;*

c. send a copy of this Order to each member of the Legislature before December 1; and

d. submit a copy of this Order for publication in the *Texas Register.*

SIGNED AND ENTERED this 20th day of August, 2008.

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Wallace B. Jefferson, Chief Justice

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Nathan L. Hecht, Justice

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Harriet O'Neill, Justice

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J. Dale Wainwright, Justice

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Scott Brister, Justice

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David M. Medina, Justice

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Paul W. Green, Justice

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Phil Johnson, Justice

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Don R. Willett, Justice

Rule 15. Appeals from Trial Courts in Counties Assigned to Multiple Appellate Districts.

15.1 Applicability. This rule applies to appeals from an order or judgment issued by a trial court in a county assigned by law to more than one court of appeals district unless assignment of such appeals is governed by statute. This rule does not apply to appeals to the Courts of Appeals for the First and Fourteenth Districts from trial courts in counties in those districts, as assignment of such appeals is governed by statute.

15.2 When Consolidation Required. If notices of appeal filed by two or more parties from a single judgment or order designate different courts of appeals that have jurisdiction of the appeal because the county in which the trial court sits is assigned to more than one appellate district, the appeals must be consolidated in one of the courts of appeals.

15.3 Consolidation by Agreement; Notice to Courts of Appeals.

(a) *Appealing Parties to Confer Regarding Consolidation.* When any appealing party learns that two or more parties have properly designated different courts of appeals, that party must promptly confer with lead counsel for all other appealing parties (if represented, otherwise counsel must confer with the pro se party) and determine if all appealing parties will agree to consolidate the appeals in one of the courts of appeals.

(b) *Time to Provide Notice.* No later than 30 days -- 20 days in an accelerated appeal -- after the filing date of the first-filed notice of appeal described in paragraph (a), the parties must submit to the clerks of both courts of appeals written notice either of the appealing parties' agreement to consolidate the appeals or of the appealing parties' inability to reach agreement regarding consolidation.

(c) *Contents of Notice.* The notice must identify each appealing party and the party's counsel (if represented, or state that the party is pro se), and must either identify the court of appeals designated by agreement or state that the appealing parties were unable to agree to consolidate all appeals in a particular court. The notice must also contain a certificate stating that the filing parties conferred, or made a reasonable attempt to confer, with all other appealing parties regarding consolidation of the appeals. If the notice states that all appealing parties have agreed to consolidation, it must identify every party or party's attorney who agreed to the consolidation.

(d) *Consolidation by Agreement of All Appealing Parties.* If the clerks of both courts of appeals receive notice that all appealing parties have agreed to consolidation, the chief justices of both courts will request the Chief Justice of the Supreme Court to transfer all pending appeals in the case to the court of appeals designated by the parties' agreement.

15.4 Consolidation When Appealing Parties Unable to Agree.

(a) *Clerks of Courts of Appeals to Jointly Notify Trial Court Clerk.*

(1) If both courts of appeals receive notice of the appealing parties' inability to reach agreement regarding consolidation, the clerks of both appellate courts must jointly notify the clerk of the trial court in writing of that fact.

(2) If the period described in Rule 15.3(b) has passed and the clerks of the two courts of appeals have not received any notice from the appealing parties regarding consolidation, the chief justices of the two courts of appeals shall confer and instruct the clerks of their respective courts to jointly notify the clerk of the trial court in writing that the appealing parties failed to timely submit notice of agreement regarding consolidation, and instruct the clerk to perform the selection process in Rule 15.4(b).

(b) *Consolidation by Trial Court Clerk.* After the trial court clerk receives notice from the clerks of the courts of appeals regarding either the appealing parties' inability to reach agreement as to consolidation or their failure to timely submit notice of agreement, the clerk shall write the numbers of the two courts of appeals on identical slips of paper and place the slips in a container folded in half or otherwise arranged so that the numbers are completely hidden from view. The trial court clerk shall draw a number from the container at random, in a public place, and shall assign the case to the court of appeals for the corresponding number drawn.

15.5 All Appeals From Same Judgment or Order to be Consolidated Together. When appeals to multiple courts of appeals have been consolidated pursuant to this rule, other parties' appeals from the same judgment or order underlying the consolidated appeals must be assigned to the same court of appeals in which the previous appeals were consolidated.

Comment

Assignments to the Courts of Appeals for the First and Fourteenth Districts are governed by Tex. Gov't Code §22.202(h).

TRD-200804740
Kennon L. Peterson
Rules Attorney
Supreme Court of Texas
Filed: September 3, 2008

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Technical Corrections to the Amendments to the Texas Rules of Appellate Procedure

Misc. Docket No. 08-9115a

ORDERED that:

1. The amendments to the Texas Rules of Appellate Procedure promulgated by Order dated August 20, 2008, in Misc. Docket No. 08-9115, are corrected as follows, effective September 1, 2008.

2. In the comment under Rule 9, the reference to Section 109.022(d) of the Family Code is changed to Section 109.002(d) of the Family Code.

3. In the first sentence of Subdivision 28.1(d), the second reference to the term "Rule" is removed.

4. The letter "s" is removed from the term "changes" in the comment under Subdivision 38.4, the phrase "regarding oral argument" is removed from the comment under Subdivision 38.4, and the comments for Subdivisions 38.1 and 38.4 are combined and placed at the end of Rule 38.

5. In the second sentence of Subdivision 49.7, the phrase "en banc consideration" is changed to "en banc reconsideration."

6. The Clerk is directed to:

a. file a copy of this Order with the Secretary of State;

b. cause a copy of this Order to be mailed to each registered member of the State Bar of Texas by publication in the *Texas Bar Journal;*

c. send a copy of this Order to each member of the Legislature before December 1; and

d. submit a copy of this Order for publication in the *Texas Register.*

SIGNED AND ENTERED this 25th day of August, 2008.

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Wallace B. Jefferson, Chief Justice

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Nathan L. Hecht, Justice

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Harriet O'Neill, Justice

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J. Dale Wainwright, Justice

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Scott Brister, Justice

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David M. Medina, Justice

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Paul W. Green, Justice

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Phil Johnson, Justice

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Don R. Willett, Justice

TRD-200804737
Kennon L. Peterson
Rules Attorney
Supreme Court of Texas
Filed: September 3, 2008

♦ ♦ ♦

The Texas A&M University System

Notice of Sale of Oil, Gas, and Sulphur Lease

The Board of Regents of The Texas A&M University System, pursuant to provisions of Vernon's Texas Code Annotated, Education Code, Chapter 85, as amended, and subject to all policies and regulations promulgated by the Board of Regents, offers for sale at public auction in Suite 2079, System Real Estate Office, The Texas A&M University System, A&M System Building, 200 Technology Way, College Station, Texas, at 10:00 a.m., Wednesday, October 15, 2008, an oil, gas and sulphur lease on the following described land in Henderson County, Texas. The property offered for lease contains 81.25 mineral acres, more or less, and is more particularly described as follows:

Being an undivided 1/12 interest in 975 acres of land, more or less, a part of the Thomas S. Mitchell Survey A-488 of Henderson County, Texas; and being the same land as described as 950 acres in a deed dated April 10, 1946, of record in Volume 307, Page 440 of the Deed Records of Henderson County, Texas.

The minimum lease terms, which apply to this tract, are as follows:

(1) Bonus: Market rate, but in no event will it be less than $250 per net mineral acre

(2) Royalty: 25%

(3) Primary term: Three (3) years

(4) Net Mineral Acres: 81.25 (More or Less)

Highest bidder shall pay to the Board of Regents on the day of the sale 25% of the bonus bid, and the balance of the bid shall be paid to the Board within twenty-four (24) hours after notification that the bid has been accepted. All payments shall be by cash, certified check or cashier's check as the Board may direct. Failure to pay the balance of the amount bid will result in forfeiture to the Board of the 25% paid. The Board of Regents of The Texas A&M University System **RESERVES THE RIGHT TO REJECT ANY AND ALL BIDS**. The successful bidder will be required to pay all advertising expenses and administrative costs.

Further inquiries concerning oil, gas and sulphur leases on System land should be directed to:

Melody Meyer

System Real Estate Office

The Texas A&M University System

200 Technology Way, Suite 2079

College Station, Texas 77845-3424

(979) 458-6350

TRD-200804714
Vickie Burt Spillers
Executive Secretary to the Board
The Texas A&M University System
Filed: September 2, 2008

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Texas Department of Transportation

Aviation Division - Request for Proposal for Aviation Engineering Services

Calhoun County, through its agent the Texas Department of Transportation (TxDOT), intends to engage an aviation professional engineering firm for services pursuant to Government Code, Chapter 2254, Subchapter A. TxDOT Aviation Division will solicit and receive proposals for professional aviation engineering design services described below.

The following is a listing of proposed projects at the Calhoun County Airport during the course of the next five years through multiple grants.

Current Project: Calhoun County. TxDOT CSJ No. 0921PTLAV. Overlay and mark Runway 14-32.

The HUB goal for the current project is 7%. TxDOT Project Manager is Harry Lorton, P.E.

Future scope work items for engineering/design services within the next five years may include but are not necessarily limited to the following:

1. Construct auto parking
2. Overlay and mark parallel taxiway and cross taxiways
3. Expand and overlay apron
4. Install REIL Runway 14-32
5. Install taxiway clear reflectors
6. Install PAPI-4 runway 32
7. Regrade ditches

Calhoun County reserves the right to determine which of the above scope of services may or may not be awarded to the successful firm and to initiate additional procurement action for any of the services above.

To assist in your proposal preparation the criteria, 5010 drawing, project narrative, and most recent Airport Layout Plan are available online at www.txdot.gov/avn/avninfo/notice/consult/index.htm by selecting "Calhoun County Airport". The proposal should address a technical approach for the current scope only. Firms shall use page 4, Recent Airport Experience, to list relevant past projects for both current and future scope.

Interested firms shall utilize the latest version of Form AVN-550, titled "Aviation Engineering Services Proposal". The form may be requested from TxDOT Aviation Division, 125 East 11th Street, Austin, Texas 78701-2483, phone number, 1-800-68-PILOT (74568). The form may be emailed by request or downloaded from the TxDOT web site at www.txdot.gov/services/aviation/consultant.htm. The form may not be altered in any way. All printing must be in black on white paper, except for the optional illustration page. Firms must carefully follow the instructions provided on each page of the form. Proposals may not exceed the number of pages in the proposal format. The proposal format consists of seven pages of data plus two optional pages consisting of an illustration page and a proposal summary page. Proposals shall be stapled but not bound in any other fashion. PROPOSALS WILL NOT BE ACCEPTED IN ANY OTHER FORMAT.

ATTENTION: To ensure utilization of the latest version of Form AVN-550, firms are encouraged to download Form AVN-550 from the TxDOT website as addressed above. Utilization of Form AVN-550 from a previous download may not be the exact same format. Form AVN-550 is a PDF Template.

Please note:

Six completed, unfolded copies of Form AVN-550 **must be received** by TxDOT Aviation Division at 150 East Riverside Drive, 5th Floor, South Tower, Austin, Texas 78704 no later than October 7, 2008, 4:00 p.m. Electronic facsimiles or forms sent by email will not be accepted. Please mark the envelope of the forms to the attention of Sheri Quinlan.

The consultant selection committee will be composed of local government members. The final selection by the committee will generally be made following the completion of review of proposals. The committee will review all proposals and rate and rank each. The criteria for evaluation engineering proposals can be found at http://www.dot.state.tx.us/services/aviation/consultant.htm. All firms will be notified and the top rated firm will be contacted to begin fee negotiations. The selection committee does, however, reserve the right to conduct interviews for the top rated firms if the committee deems it necessary. If interviews are conducted, selection will be made following interviews.

Please contact TxDOT Aviation for any technical or procedural questions at 1-800-68-PILOT (74568). For procedural questions, please contact Sheri Quinlan, Grant Manager. For technical questions, please contact Harry Lorton, Project Manager.

TRD-200804732
Joanne Wright
Deputy General Counsel
Texas Department of Transportation
Filed: September 3, 2008

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Aviation Division - Request for Proposal for Aviation Engineering Services

The City of Ballinger, through its agent the Texas Department of Transportation (TxDOT), intends to engage an aviation professional engineering firm for services pursuant to Government Code, Chapter 2254, Subchapter A. TxDOT Aviation Division will solicit and receive proposals for professional aviation engineering design services described below.

The following is a listing of proposed projects at the Bruce Field Airport during the course of the next five years through multiple grants.

Current Project: The City of Ballinger. TxDOT CSJ No. 0907BLNGR. Rehabilitate hangar access taxiway, stub taxiway, turnaround, AG apron, Runway 17-35 and AG stub taxiway; mark stub taxiway, turnaround, and Runway 17-35, and expand AG apron at the Bruce Field Airport.

The HUB goal for the current project is 6%. TxDOT Project Manager is Clayton Bridwell.

Future scope work items for engineering/design services within the next five years may include but are not necessarily limited to the following:

1. Rehabilitate apron
2. Replace rotating beacon and tower
3. Install PAPI-2 Runway 35 end
4. Pave auto parking area (5 spaces)

The City of Ballinger reserves the right to determine which of the above scope of services may or may not be awarded to the successful firm and to initiate additional procurement action for any of the services above.

To assist in your proposal preparation the criteria, 5010 drawing, project narrative, and most recent Airport Layout Plan are available online at www.txdot.gov/avn/avninfo/notice/consult/index.htm by selecting "Bruce Field Airport." The proposal should address a technical approach for the current scope only. Firms shall use page 4, Recent Airport Experience, to list relevant past projects for both current and future scope.

Interested firms shall utilize the latest version of Form AVN-550, titled "Aviation Engineering Services Proposal." The form may be requested from TxDOT Aviation Division, 125 East 11th Street, Austin, Texas 78701-2483, phone number, 1-800-68-PILOT (74568). The form may be emailed by request or downloaded from the TxDOT web site at www.txdot.gov/services/aviation/consultant.htm. The form may not be altered in any way. All printing must be in black on white paper, except for the optional illustration page. Firms must carefully follow the instructions provided on each page of the form. Proposals may not exceed the number of pages in the proposal format. The proposal format consists of seven pages of data plus two optional pages consisting of an illustration page and a proposal summary page. Proposals shall be stapled but not bound in any other fashion. PROPOSALS WILL NOT BE ACCEPTED IN ANY OTHER FORMAT.

ATTENTION: To ensure utilization of the latest version of Form AVN-550, firms are encouraged to download Form AVN-550 from the TxDOT website as addressed above. Utilization of Form AVN-550 from a previous download may not be the exact same format. Form AVN-550 is a PDF Template.

Please note:

Five completed, unfolded copies of Form AVN-550 **must be received** by TxDOT Aviation Division at 150 East Riverside Drive, 5th Floor, South Tower, Austin, Texas 78704 no later than October 7, 2008, 4:00 p.m. Electronic facsimiles or forms sent by email will not be accepted. Please mark the envelope of the forms to the attention of Sheri Quinlan.

The consultant selection committee will be composed of Aviation Division staff members. The final selection by the committee will generally be made following the completion of review of proposals. The committee will review all proposals and rate and rank each. The criteria for evaluating engineering proposals can be found at http://www.txdot.gov/services/aviation/consultant.htm. All firms will be notified and the top rated firm will be contacted to begin fee negotiations. The selection committee does, however, reserve the right to conduct interviews for the top rated firms if the committee deems it necessary. If interviews are conducted, selection will be made following interviews.

Please contact TxDOT Aviation for any technical or procedural questions at 1-800-68-PILOT (74568). For procedural questions, please contact Sheri Quinlan, Grant Manager. For technical questions, please contact Clayton Bridwell, Project Manager.

TRD-200804729
Joanne Wright
Deputy General Counsel
Texas Department of Transportation
Filed: September 3, 2008

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Aviation Division - Request for Proposal for Aviation Engineering Services

The City of San Marcos, through its agent the Texas Department of Transportation (TxDOT), intends to engage an aviation professional engineering firm for services pursuant to Government Code, Chapter 2254, Subchapter A. TxDOT Aviation Division will solicit and receive proposals for professional aviation engineering design services described below.

The following is a listing of proposed projects at the San Marcos Municipal Airport during the course of the next five years through multiple grants.

Current Project: City of San Marcos. TxDOT CSJ No. 0914SMRCO. Install chain link and barbed wire fence; install 9 gates; install fence signs, and clear brush along airport perimeter at the San Marcos Municipal Airport.

The DBE goal for the current project is 5%. TxDOT Project Manager is Russell Deason.

Future scope work items for engineering/design services within the next five years may include but are not necessarily limited to the following:

1. Construct new entrance road for northside terminal area
2. Design and construct new perimeter road
3. Construct new terminal building apron
4. Overlay taxiway J
5. Replace MITL on all taxiways (except taxiway J)
6. New terminal building

The City of San Marcos reserves the right to determine which of the above scope of services may or may not be awarded to the successful firm and to initiate additional procurement action for any of the services above.

To assist in your proposal preparation the criteria, 5010 drawing, project narrative, and most recent Airport Layout Plan are available online at www.txdot.gov/avn/avninfo/notice/consult/index.htm by selecting "San Marcos Municipal Airport". The proposal should address a technical approach for the current scope only. Firms shall use page 4, Recent Airport Experience, to list relevant past projects for both current and future scope.

Interested firms shall utilize the latest version of Form AVN-550, titled "Aviation Engineering Services Proposal". The form may be requested from TxDOT Aviation Division, 125 East 11th Street, Austin, Texas 78701-2483, phone number, 1-800-68-PILOT (74568). The form may be emailed by request or downloaded from the TxDOT web site at www.txdot.gov/services/aviation/consultant.htm. The form may not be altered in any way. All printing must be in black on white paper, except for the optional illustration page. Firms must carefully follow the instructions provided on each page of the form. Proposals may not exceed the number of pages in the proposal format. The proposal format consists of seven pages of data plus two optional pages consisting of an illustration page and a proposal summary page. Proposals shall be stapled but not bound in any other fashion. PROPOSALS WILL NOT BE ACCEPTED IN ANY OTHER FORMAT.

ATTENTION: To ensure utilization of the latest version of Form AVN-550, firms are encouraged to download Form AVN-550 from the TxDOT website as addressed above. Utilization of Form AVN-550 from a previous download may not be the exact same format. Form AVN-550 is a PDF Template.

Please note:

Five completed, unfolded copies of Form AVN-550 **must be received** by TxDOT Aviation Division at 150 East Riverside Drive, 5th Floor, South Tower, Austin, Texas 78704 no later than October 7, 2008, 4:00 p.m. Electronic facsimiles or forms sent by email will not be accepted. Please mark the envelope of the forms to the attention of Sheri Quinlan.

The consultant selection committee will be composed of Aviation Division staff members and one local government member. The final selection by the committee will generally be made following the completion of review of proposals. The committee will review all proposals and rate and rank each. The criteria for evaluating engineering proposals can be found at http://www.txdot.gov/services/aviation/consultant.htm. All firms will be notified and the top rated firm will be contacted to begin fee negotiations. The selection committee does, however, reserve the right to conduct interviews for the top rated firms if the committee deems it necessary. If interviews are conducted, selection will be made following interviews.

Please contact TxDOT Aviation for any technical or procedural questions at 1-800-68-PILOT (74568). For procedural questions, please contact Sheri Quinlan, grant Manager. For technical questions, please contact Russell Deason, Project Manager.

TRD-200804730
Joanne Wright
Deputy General Counsel
Texas Department of Transportation
Filed: September 3, 2008

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Aviation Division - Request for Proposal for Aviation Engineering Services

The Town of Pecos City, through its agent the Texas Department of Transportation (TxDOT), intends to engage an aviation professional engineering firm for services pursuant to Government Code, Chapter 2254, Subchapter A. TxDOT Aviation Division will solicit and receive proposals for professional aviation engineering design services described below.

The following is a listing of proposed projects at the Pecos Municipal Airport during the course of the next five years through multiple grants.

Current Project: Town of Pecos City. TxDOT CSJ No.: 0906PECOS. Rehabilitate Runway 9-27 and Runway 14-32, rehabilitate hangar access taxiway and apron, rehabilitate Taxiway A, B, C, D, E, F and P; stripe and mark Runway 14-32 and Runway 9-27; mark apron and taxiways at the Pecos Municipal Airport.

The DBE goal for the current project is 8%. TxDOT Project Manager is Clayton Bridwell.

Future scope work items for engineering/design services within the next five years may include but are not necessarily limited to the following:

1. Widen Runway 14-32 and Runway 9-27
2. Crack seal Runway 9-27
3. Install REIL Runway 14-32 and Runway 9-27
4. Install PAPI-4 Runway 9-27
5. Install segmented circle
6. Pave entrance road

The Town of Pecos City reserves the right to determine which of the above scope of services may or may not be awarded to the successful firm and to initiate additional procurement action for any of the services above.

To assist in your proposal preparation the criteria, 5010 drawing, project narrative, and most recent Airport Layout Plan are available online at www.txdot.gov/avn/avninfo/notice/consult/index.htm by selecting "Pecos Municipal Airport". The proposal should address a technical approach for the current scope only. Firms shall use page 4, Recent Airport Experience, to list relevant past projects for both current and future scope.

Interested firms shall utilize the latest version of Form AVN-550, titled "Aviation Engineering Services Proposal". The form may be requested from TxDOT, Aviation Division, 125 East 11th Street, Austin, Texas 78701-2483, phone number, 1-800-68-PILOT (74568). The form may be emailed by request or downloaded from the TxDOT web site at www.txdot.gov/services/aviation/consultant.htm. The form may not be altered in any way. All printing must be in black on white paper, except for the optional illustration page. Firms must carefully follow the instructions provided on each page of the form. Proposals may not exceed the number of pages in the proposal format. The proposal format consists of seven pages of data plus two optional pages consisting of an illustration page and a proposal summary page. Proposals shall be stapled but not bound in any other fashion. PROPOSALS WILL NOT BE ACCEPTED IN ANY OTHER FORMAT.

ATTENTION: To ensure utilization of the latest version of Form AVN-550, firms are encouraged to download Form AVN-550 from the TxDOT website as addressed above. Utilization of Form AVN-550 from a previous download may not be the exact same format. Form AVN-550 is a PDF Template.

Please note:

Six completed, unfolded copies of Form AVN-550 **must be received** by TxDOT Aviation Division at 150 East Riverside Drive, 5th Floor, South Tower, Austin, Texas 78704 no later than October 7, 2008, 4:00 p.m. Electronic facsimiles or forms sent by email will not be accepted. Please mark the envelope of the forms to the attention of Sheri Quinlan.

The consultant selection committee will be composed of Aviation Division staff members and one local government member. The final selection by the committee will generally be made following the completion of review of proposals. The committee will review all proposals and rate and rank each. The criteria for evaluating engineering proposals can be found at http://www.txdot.gov/services/aviation/consultant.htm. All firms will be notified and the top rated firm will be contacted to begin fee negotiations. The selection committee does, however, reserve the right to conduct interviews for the top rated firms if the committee deems it necessary. If interviews are conducted, selection will be made following interviews.

Please contact TxDOT Aviation for any technical or procedural questions at 1-800-68-PILOT (74568). For procedural questions, please contact Sheri Quinlan, Grant Manager. For technical questions, please contact Clayton Bridwell, Project Manager.

TRD-200804731
Joanne Wright
Deputy General Counsel
Texas Department of Transportation
Filed: September 3, 2008

Aviation Division - Request for Proposal for Professional Services

Brazoria County, through its agent the Texas Department of Transportation (TxDOT), intends to engage an aviation professional services firm for services pursuant to Government Code, Chapter 2254, Subchapter A. TxDOT Aviation Division will solicit and receive proposals for professional services as described below:

Airport Sponsor: Brazoria County, Brazoria County Airport. TxDOT CSJ No. 09MPANGLE. Scope: Airport Master Plan Update Prepare an Airport Development Plan which includes, but is not limited to, information regarding existing and future conditions, proposed facility development to meet existing and future demand, constraints to develop, anticipated capital needs, financial considerations, management structure and options, as well as an updated Airport Layout Plan. The Airport Development Plan should be tailored to the individual needs of the airport.

There is no HUB goal. TxDOT Project Manager is Michelle Hannah.

Interested firms shall utilize the Form AVN-551, titled "Aviation Planning Services Proposal". The form may be requested from TxDOT Aviation Division, 125 East 11th Street, Austin, Texas 78701-2483, phone number, 1-800-68-PILOT (74568). The form may be emailed by request or downloaded from the TxDOT web site at www.txdot.gov/services/aviation/consultant.htm. The form may not be altered in any way. All printing must be in black on white paper, except for the optional illustration page. Firms must carefully follow the instructions provided on each page of the form. Proposals may not exceed the number of pages in the proposal format. The proposal format consists of seven pages of data plus two optional pages consisting of an illustration page and a proposal summary page. Proposals shall be stapled but not bound in any other fashion. PROPOSALS WILL NOT BE ACCEPTED IN ANY OTHER FORMAT.

ATTENTION: To ensure utilization of the latest version of Form AVN-551, firms are encouraged to download Form AVN-551 from the TxDOT website as addressed above. Utilization of Form AVN-551 from a previous download may not be the exact same format. Form AVN-551 is an MS Word Template.

Please note:

Five completed, unfolded copies of Form AVN-551 **must be received** by TxDOT Aviation Division at 150 East Riverside Drive, 5th Floor, South Tower, Austin, Texas 78704 no later than October 7, 2008, 4:00 p.m. Electronic facsimiles or forms sent by email will not be accepted. Please mark the envelope of the forms to the attention of Sheri Quinlan.

The consultant selection committee will be composed of local government members. The final selection by the committee will generally be made following the completion of review of proposals. The committee will review all proposals and rate and rank each. The criteria for evaluating consultants for airport planning projects can be found at http://www.txdot.gov/services/aviation/consultant.htm. All firms will be notified and the top rated firm will be contacted to begin fee negotiations. The selection committee does, however, reserve the right to conduct interviews for the top rated firms if the committee deems it necessary. If interviews are conducted, selection will be made following interviews.

If there are any procedural questions, please contact Sheri Quinlan, Grant Manager, or Michelle Hannah, Project Manager for technical questions at 1-800-68-PILOT (74568).

TRD-200804733
Joanne Wright
Deputy General Counsel
Texas Department of Transportation
Filed: September 3, 2008

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Public Notice - Disadvantaged Business Enterprise Goals Fiscal Year 2009

In accordance with Title 49, Code of Federal Regulations (C.F.R), Part 26, recipients of federal-aid funds authorized by the Transportation Equity Act for the 21st Century (TEA 21) are required to establish Disadvantaged Business Enterprise (DBE) programs. Title 49 C.F.R. §26.45 requires the recipients of federal funds, including the Texas Department of Transportation, to set overall goals for DBE participation in U. S. Department of Transportation assisted contracts. As part of this goal-setting process, the Texas Department of Transportation is publishing this notice to inform the public of the proposed overall goals, and to provide instructions on how to obtain copies of documents explaining the rationale for each goal.

The proposed Fiscal Year 2009 DBE goals are 11.0% for highway design and construction, 12.5% for aviation design and construction, and 3.6% for public transportation. The proposed goals and goal-setting methodology for each is available for inspection between the hours of 8:00 a.m. and 5:00 p.m., Monday through Friday, for 30 days following the date of this notice. The information may be viewed in the office of the Texas Department of Transportation, Office of Civil Rights, 200 East Riverside Drive, Austin, Texas 78704.

The Department will accept comments on the DBE goals for 45 days from the date of this notice. Comments can be sent to Eli Lopez, Office of Civil Rights, 125 East 11th St., Austin, Texas 78701; (512) 486-5511; Fax: (512) 486-5509; email: elopez3@dot.state.tx.us.

TRD-200804741
Joanne Wright
Deputy General Counsel
Texas Department of Transportation
Filed: September 3, 2008

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How to Use the Texas Register

Information Available: The 14 sections of the ***Texas Register*** represent various facets of state government. Documents contained within them include:

Governor - Appointments, executive orders, and proclamations.

Attorney General - summaries of requests for opinions, opinions, and open records decisions.

Secretary of State - opinions based on the election laws.

Texas Ethics Commission - summaries of requests for opinions and opinions.

Emergency Rules- sections adopted by state agencies on an emergency basis.

Proposed Rules - sections proposed for adoption.

Withdrawn Rules - sections withdrawn by state agencies from consideration for adoption, or automatically withdrawn by the Texas Register six months after the proposal publication date.

Adopted Rules - sections adopted following public comment period.

Texas Department of Insurance Exempt Filings - notices of actions taken by the Texas Department of Insurance pursuant to Chapter 5, Subchapter L of the Insurance Code.

Texas Department of Banking - opinions and exempt rules filed by the Texas Department of Banking.

Tables and Graphics - graphic material from the proposed, emergency and adopted sections.

Transferred Rules- notice that the Legislature has transferred rules within the *Texas Administrative Code* from one state agency to another, or directed the Secretary of State to remove the rules of an abolished agency.

In Addition - miscellaneous information required to be published by statute or provided as a public service.

Review of Agency Rules - notices of state agency rules review.

Specific explanation on the contents of each section can be found on the beginning page of the section. The division also publishes cumulative quarterly and annual indexes to aid in researching material published.

How to Cite: Material published in the ***Texas Register*** is referenced by citing the volume in which the document appears, the words "TexReg" and the beginning page number on which that document was published. For example, a document published on page 2402 of Volume 30 (2005) is cited as follows: 30 TexReg 2402.

In order that readers may cite material more easily, page numbers are now written as citations. Example: on page 2 in the lower-left hand corner of the page, would be written "30 TexReg 2 issue date," while on the opposite page, page 3, in the lower right-hand corner, would be written "issue date 30 TexReg 3."

How to Research: The public is invited to research rules and information of interest between 8 a.m. and 5 p.m. weekdays at the ***Texas Register*** office, Room 245, James Earl Rudder Building, 1019 Brazos, Austin. Material can be found using ***Texas Register*** indexes, the ***Texas Administrative Code***, section numbers, or TRD number.

Both the ***Texas Register*** and the ***Texas Administrative Code*** are available online through the Internet. The address is: http://www.sos.state.tx.us. The ***Register*** is available in an .html version as well as a .pdf (portable document format) version through the Internet. For website subscription information, call the Texas Register at (512) 463-5561.

Texas Administrative Code

The ***Texas Administrative Code (TAC***) is the compilation of all final state agency rules published in the ***Texas Register***. Following its effective date, a rule is entered into the ***Texas Administrative Code***. Emergency rules, which may be adopted by an agency on an interim basis, are not codified within the ***TAC***.

The ***TAC*** volumes are arranged into Titles and Parts (using Arabic numerals). The Titles are broad subject categories into which the agencies are grouped as a matter of convenience. Each Part represents an individual state agency.

The complete TAC is available through the Secretary of State's website at http://www.sos.state.tx.us/tac. The following companies also provide complete copies of the TAC: Lexis-Nexis (1-800-356-6548), and West Publishing Company (1-800-328-9352).

The Titles of the ***TAC***, and their respective Title numbers are:

1. Administration
4. Agriculture
7. Banking and Securities
10. Community Development
13. Cultural Resources
16. Economic Regulation
19. Education
22. Examining Boards
25. Health Services
28. Insurance
30. Environmental Quality
31. Natural Resources and Conservation
34. Public Finance
37. Public Safety and Corrections
40. Social Services and Assistance
43. Transportation

How to Cite: Under the ***TAC*** scheme, each section is designated by a ***TAC*** number. For example in the citation 1 TAC §27.15: 1 indicates the title under which the agency appears in the ***Texas Administrative Code***; ***TAC*** stands for the ***Texas Administrative Code***; §27.15 is the section number of the rule (27 indicates that the section is under Chapter 27 of Title 1; 15 represents the individual section within the chapter).

How to update: To find out if a rule has changed since the publication of the current supplement to the ***Texas Administrative Code***, please look at the ***Table of TAC Titles Affected***. The table is published cumulatively in the blue-cover quarterly indexes to the ***Texas Register*** (January 21, April 15, July 8, and October 7, 2005). If a rule has changed during the time period covered by the table, the rule's ***TAC*** number will be printed with one or more ***Texas Register*** page numbers, as shown in the following example.

TITLE 40. SOCIAL SERVICES AND ASSISTANCE
Part I. Texas Department of Human Services
40 TAC §3.704.....950, 1820

The ***Table of TAC Titles Affected*** is cumulative for each volume of the ***Texas Register*** (calendar year).